DOCKET

No. 07-581
Title: 14 Penn Plaza LLC, et al., Petitioners
v.
Steven Pyett, et al.
Docketed: November 1, 2007
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (06-3047, 06-3106)
Decision Date: August 1, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 30 2007	Petition for a writ of certiorari filed. (Response due December 3, 2007)
Nov 15 2007	Order extending time to file response to petition to and including January 17, 2008.
Jan 16 2008	Brief of respondents Steven Pyett, Thomas O'Connell, and Michael Phillips in opposition filed.
Jan 29 2008	Reply of petitioners 14 Penn Plaza LLC, et al. filed. (Distributed)
Jan 30 2008	DISTRIBUTED for Conference of February 15, 2008.
Feb 19 2008	Petition GRANTED.
Mar 6 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including May 5, 2008.
May 5 2008	Joint appendix filed. (Statement of Costs received.)
May 5 2008	Brief of petitioners 14 Penn Plaza LLC, et al. filed.
May 8 2008	Proposal to lodge copies of a facsimile from counsel for the petitioners.
May 9 2008	The time within which to file respondents' brief on the merits is extended to and including July 7, 2008.
May 12 2008	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
May 12 2008	Brief amicus curiae of Equal Employment Advisory Council filed.
Jun 27 2008	Brief amicus curiae of National Academy of Arbitrators filed.
Jul 3 2008	The time within which to file respondents' brief on the merits is further extended to and including July 14, 2008.
Jul 3 2008	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondents.
Jul 10 2008	Brief amicus curiae of Service Employees International Union, Local 32BJ filed.
Jul 14 2008	Brief of respondents Steven Pyett, et al. filed.
Jul 15 2008	Brief amicus curiae of National Right to Work Legal Defense Foundation, Inc. filed.
Jul 18 2008	Brief amici curiae of American Federation of Labor and Congress of

	Industrial Organizations, et al. filed.
Jul 21 2008	Brief amicus curiae of United States filed.
Jul 21 2008	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
Jul 21 2008	Brief amici curiae of National Employment Lawyers Association, et al. filed.
Jul 21 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 13 2008	Reply of petitioners 14 Penn Plaza LLC, and Temco Service Industries, Inc. filed.
Sep 5 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 8 2008	SET FOR ARGUMENT ON Monday, December 1, 2008.
Sep 12 2008	CIRCULATED.
Oct 9 2008	Record from the U.S.D.C. for the Southern District of New York is electronically filed.
Oct 10 2008	Record received from the U.S.C.A. for the Second Circuit. (1 box)
Dec 1 2008	Argued. For petitioners: Paul Salvatore, New York, N.Y. For respondents: David C. Frederick, Washington, D.C.; and Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

PETITION
FOR
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No. 07-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,

Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an arbitration clause contained in a collective bargaining agreement, freely negotiated by a union and an employer, which clearly and unmistakably waives the union members' right to a judicial forum for their statutory discrimination claims, enforceable?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the only party appearing before the U.S. Court of Appeals for the Second Circuit whose name does not appear in the caption of the Petition for a Writ of Certiorari is the Pennsylvania Building Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

14 Penn Plaza LLC has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

Temco Services Industries, Inc. is a publicly traded company. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 498 F.3d 88 (2d Cir. 2007). App. 1a. The Second Circuit affirmed the decision of the United States District Court for the Southern District of New York, which is reported at 04 Civ. 7536, 2006 U.S. Dist. LEXIS 35952 (S.D.N.Y. June 1, 2006). App. 13a. The District Court explained its reasoning in its prior decision in *Granados v. Harvard Maintenance, Inc.*, which is reported at No. 05 Civ. 5489 (NRB), 2006 U.S. Dist. LEXIS 6918 (S.D.N.Y. Feb. 22, 2006). App. 23a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 2007. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* Respondents filed this action pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621, *et seq.* The pertinent provisions of each statute are reproduced at 49a-51a and 52a-66a.

STATEMENT OF THE CASE

This case presents an issue of exceptional importance to organized labor, management, and union members: whether, to achieve all the mutual benefits that arbitration offers over litigation, a union can agree with an employer to the arbitration of its members' claims under the ADEA and other statutes. This Court has previously acknowledged that this question is undecided under its precedents. *See Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 82 (1998).

In the decision below, the Second Circuit held that no union-negotiated arbitration agreement – no matter how clear and explicit – is ever enforceable. The Fourth Circuit, however, has long held precisely the opposite, routinely enforcing such clear and unmistakable agreements. This conflict in the circuits – and between state courts and federal courts – necessitates the intervention of this Court to resolve the question.

A. Factual Background

1. For many decades, Local 32BJ of the Service Employees International Union ("Local 32BJ" or the "Union"), which represents over 85,000 employees nationwide in the building services industry, and the Realty Advisory Board on Labor Relations, Inc. (the "RAB"), the New York City real estate industry's multi-employer bargaining association, have engaged in industry-wide collective bargaining. Over this period, the parties have agreed to, and continually have revised, their Collective Bargaining Agreement for Contractors (the "CBA"). Among other provisions, the CBA prohibits

discrimination in employment – an important goal for labor, management, and employees in the "melting pot" of the New York City labor market.

Beginning in 1999, the parties agreed to a CBA provision that expressly requires employees to submit any claims of employment discrimination, including claims of age discrimination arising under federal, state, and city law, to binding arbitration under the CBA's grievance and dispute resolution procedures. The provision states:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

App. 48a.[1]

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[1] In addition to the CBA, the RAB negotiates and administers several other collective bargaining agreements with Local 32BJ and other unions, covering approximately 65,000

(Cont'd)

The bargaining parties specifically crafted this language to track this Court's requirement, set forth in *Wright*, that any waiver of rights to adjudicate statutory claims be "clear and unmistakable." It is undisputed that the CBA's waiver is clear and unmistakable in its language and intent. App. 6a, 21a, 37a-38a.

2. This arbitration provision was heavily negotiated by Local 32BJ and the RAB. As part of the bargaining leading to this clause, the Union gained sizable wage and benefit enhancements, as well as other favorable provisions. Furthermore, the arbitration provision itself was advantageous to the Union and its members. Without it, many of the Union-represented building service workers would be compelled to become pro se federal court plaintiffs to bring their discrimination claims. This would be a daunting task for any individual, but especially for the large percentage of immigrant building service workers for whom English is their second language. Similarly, those employees with the means to retain an attorney would be required to pay fees or a percentage of any award.

In contrast, under the arbitration provision, these same employees receive a skilled attorney from the Union at no cost to them, and are not required to pay any administrative fees (*i.e.*, arbitrator or forum fees),

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(Cont'd)

employees and approximately 4,000 commercial and residential buildings in the New York City area. Those agreements contain arbitration provisions that are virtually identical to the provision at issue here and similarly require the arbitration of statutory discrimination claims.

which are instead shared equally by the RAB and the Union. If, for some reason, the employee would prefer to retain private counsel, the Union permits the employee to pursue the discrimination claims in the arbitral forum with his or her attorney. App. 42a.

Arbitration of discrimination disputes is also appealing to both Local 32BJ and New York City's real estate employers because it minimizes duplication of efforts, and resolves disputes quickly, inexpensively, fairly, and effectively. Most, if not all, discrimination claims arise out of the same facts and circumstances as contractual grievances alleging CBA violations. For example, an employee asserting a claim of a discharge without just cause (a contractual claim) can also assert a claim of discriminatory discharge (a statutory claim). Consolidating the process allows one fact finder – an employment attorney serving as arbitrator – to consider the facts and circumstances that encompass both claims, and make both determinations. The ability to consolidate the actions results in economies of scale for all parties involved, and ensures consistent rulings on the related issues, while providing employees and employers with the full scope of remedies and defenses available under the anti-discrimination laws.

3. Respondents are employees and former employees of Temco Service Industries, Inc. ("Temco"), a building service and cleaning contractor. Prior to August 2003, they worked as night watchmen/porters in 14 Penn Plaza LLC's (the "Company") commercial office building located at 225 West 34th Street in New York City. They are all members of Local 32BJ, covered under the CBA with the RAB.

In or about August 2003, in an effort to improve building security in response to post-9/11 security concerns, the Company engaged Spartan Security, a unionized security services contractor, to provide trained, licensed security guards to staff the front lobby desk and the rear entrance of the building. As a result, Temco's services were no longer needed in these locations. In compliance with the CBA, Temco reassigned Respondents to equivalent duties in other locations in the building. Respondents were unhappy with these reassignments and alleged, among other things, that they violated the CBA and were based on age discrimination.

B. Proceedings Below

Local 32BJ filed a grievance about the reassignments under the CBA's dispute resolution procedures, raising both contractual and statutory claims. Prior to the arbitration hearing, the portion of the grievance alleging age discrimination was withdrawn. Respondents (accompanied by their private attorney, in addition to Union-provided counsel) did not raise their age discrimination claims at any time during the arbitration proceedings. After a four-day hearing, the arbitrator denied all their contractual claims in a 19-page opinion.

Despite the fact that their personal attorney was present for the entire arbitration hearing and could have raised their age discrimination claims before the arbitrator, Respondents instead filed a lawsuit in federal court alleging that their transfers violated federal, state, and city laws prohibiting age discrimination.[2] The Company moved to dismiss Respondents' lawsuit or, alternatively, to compel arbitration of their claims pursuant to Sections 3 and 4 of the FAA (9 U.S.C. §§ 3 and 4), based on the clear agreement to arbitrate such claims contained in the CBA. The district court denied the motion to compel arbitration based on its own recent decision in another case, where it recognized that "the Supreme Court has not spoken clearly on this issue," but held that it was "constrained" to follow the Second Circuit's precedents and judicially void the arbitration provision. App. 39a n.7.

On appeal, the Second Circuit likewise acknowledged that this Court's precedents left unresolved the central question. Indeed, as it noted, those precedents are themselves in "tension," and other circuits have reached different conclusions. App. 6a n.3, 10a n.4. But it considered itself bound by its earlier decision in *Rogers v. New York Univ.*, 220 F.3d 73 (2d Cir.) (per curiam), *cert. denied*, 531 U.S. 1036 (2000), that held such agreements unenforceable.

Rogers involved a collective bargaining agreement that – unlike the CBA – did not clearly incorporate statutory claims. The court found that it did not meet *Wright's* "clear and unmistakable" test, and was not enforceable for that reason. But *Rogers* went on to hold, as an alternate ground, that even a clear arbitration provision was not "always enforceable." *Id.* at 75. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), another case in which the arbitration clause of the collective bargaining agreement between a company and a union did not cover statutory anti-discrimination claims, this Court held that the clause could not preclude later assertions of such claims in a judicial forum. From *Gardner-Denver*'s narrow holding (which *Rogers* recognized was narrowed further in later cases, *see* 220 F.3d at 75), *Rogers* inferred that *any* collective bargaining agreement clause negotiated by a union could not bar the employees' right to a judicial forum – whether the parties had deliberately negotiated such a waiver or not.

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[2] Respondents filed these claims under the ADEA, the New York State Human Rights Law, N.Y. Exec. Law § 290, *et seq.*, and the New York City Administrative Code, N.Y.C. Admin. Code § 8-107. In a separate, related action, Respondents also alleged a violation of the duty of fair representation against the Union, *inter alia*, for failing to arbitrate the age discrimination claims, but subsequently withdrew that action with prejudice.

Rogers acknowledged, as did the decision below, that this blanket negation of any and all arbitration clauses did not square with later Supreme Court precedents, which "could be taken to suggest that, under certain circumstances, a union negotiated waiver of an employee's statutory right to a judicial forum might be enforceable." App. 9a-11a (quotations omitted). But neither Second Circuit decision offered any account of what those circumstances might be.

Indeed, it is clear that under the Second Circuit's holdings, there is *no* situation – however clear the language in the collective bargaining agreement – that would make such an arbitration agreement binding. Nor did either decision take serious account of this Court's ruling in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which upheld an agreement to arbitrate entered into by an individual employee, and distinguished earlier cases that were not governed by the FAA (as this one is), and where there was no "clear and unmistakable" arbitration provision (as there is here).

Rogers noted that the Fourth Circuit had rejected its conclusion – acknowledging the conflict between the circuits. *See* 220 F.3d at 75 (citing *Austin v. Owens-Brockway Glass Container*, 78 F.3d 875, 880-86 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996)). The decision below did the same, *see* App. 10a n.4, but adhered to its own view that "nothing had changed" in the law since *Rogers* was decided. *Id.* at 11a.

REASONS FOR GRANTING THE PETITION

This Court has recognized that there is an unresolved conflict in its own jurisprudence concerning the enforceability of union-negotiated arbitration agreements. An older line of precedent beginning with *Gardner-Denver* viewed arbitration unfavorably and held that an arbitration proceeding cannot preclude the assertion of statutory claims in a judicial forum. A more recent line of precedent, typified by *Gilmer*, takes a far more positive view of arbitration and holds that arbitration provisions are enforceable so long as their forum selection language is "clear and unmistakable." This uncertainty has generated a marked conflict in the federal circuits, and between federal and state courts, leading some to hold that union-negotiated arbitration clauses are *never* enforceable, and others to hold that they are enforceable if the waiver language is clear. That conflict provides a powerful reason for this Court to grant review.

The conflict also creates a host of public policy concerns. First, neither employers nor unions are able to know or predict whether their particular provision is valid, making both the bargaining and administration of multi-jurisdictional collective bargaining agreements exceedingly difficult. Second, unionized employees working in jurisdictions that do not enforce union-negotiated arbitration clauses may be induced to sign individual waivers as a condition of continued employment – effectively removing unions from the negotiation of an important term and condition of employment. In sum, for effective employer and union operations, for productive collective bargaining, and to protect the rights of employees who are union members, there must be a consistent rule of law for the entire country – and that rule only can come from this Court.

I. THERE IS A FUNDAMENTAL CONFLICT IN THE LOWER COURTS OVER THE ENFORCEABILITY OF UNION-NEGOTIATED WAIVERS OF A JUDICIAL FORUM.

There is a pressing need for this Court to clarify the circumstances under which a union-negotiated arbitration agreement may be enforced. Until now, this Court has expressly declined to answer that question. As a result, the lower federal and state courts have been forced to rely on conflicting precedents, resulting in diametrically opposite conclusions.

A. This Court Has Acknowledged An "Obvious[] . . . Tension" In Its Jurisprudence And Has Not Resolved It.

The Second Circuit held that union-negotiated arbitration agreements are not enforceable based on this Court's 1974 decision in *Gardner-Denver*. The issue, Petitioners respectfully submit, cannot be so rotely resolved – as this Court itself has acknowledged.

In *Wright*, the Court recognized that whether a collective bargaining agreement can waive employees' statutory rights to a judicial forum calls into question "two lines" of its own cases that are "obviously [in] some tension." *Wright*, 525 U.S. at 76. *Wright* deferred resolution of that question because it found the particular language in the collective bargaining agreement there too vague and unspecific to constitute a waiver of rights. *See id.* at 77, 80. Since the instant CBA was specifically drafted to track *Wright*'s "clear and unmistakable" requirement, and the district court found that it was clear and unmistakable, App. 21a, the issue is squarely presented here.

According to *Wright*, the *Gardner-Denver* line of cases concerns the preclusive effect of prior contractual arbitrations on an employee's right to litigate certain related statutory claims. In *Gardner-Denver*, the Court addressed the question of whether an employee whose grievance had been arbitrated pursuant to a general grievance and arbitration provision in a collective bargaining agreement was subsequently barred from instituting a Title VII court action. The Court held that a general contractual grievance arbitration proceeding does not bar a subsequent related Title VII federal court action. In other words, a contract arbitration is not *res judicata* to a Title VII litigation. The Court applied this principle in later cases to permit similar post-arbitration litigation under other statutes. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (Fair Labor Standards Act); *McDonald v. West Branch*, 466 U.S. 284 (1984) (42 U.S.C. § 1983).

Gardner-Denver dealt with a purely contractual arbitration process, where the arbitrator sat only as "the proctor of the bargain." 415 U.S. at 53. The arbitrator was not able to rely on external law, and thereby was foreclosed from adjudicating statutory employment claims. The *Gardner-Denver* Court expressed the now-rejected view that the arbitral fact-finding process is not comparable to judicial fact-finding, and that the "informal" nature of arbitrations rendered them inappropriate for the resolution of Title VII claims. *Id.* at 57-58 (citing *Wilko v. Swan*, 346 U.S. 427 (1953)). But in the thirty years since, the Court has disavowed this antiquated view of arbitral inferiority. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Gilmer*, 500 U.S. 20 (1991).

According to *Wright*, the other relevant line of cases involves individual agreements to arbitrate employment disputes. In *Gilmer*, the Court required an individual non-unionized plaintiff to arbitrate his claim under the ADEA because he had signed a securities industry registration agreement consenting to arbitrate any claims arising out of his employment. *Id.* at 35. The Court emphasized that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.* at 26 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 60 U.S. 1 (1983)). It held that arbitration of, and hence waiver of the right to proceed in court with respect to, statutory discrimination claims was not "inconsistent with the statutory framework and purposes of the ADEA." *Gilmer*, 500 U.S. at 27. In so doing, it rejected old-fashioned notions that arbitration suffers from tribunal bias, insufficient discovery procedures, and inadequate remedies. Specifically, the Court stated that "[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 34.

In *Wright* itself, when this Court faced the question whether union-negotiated waivers of employees' rights to a judicial forum are enforceable, it acknowledged that *Gardner-Denver* and *Gilmer* are in tension – for *Gilmer* allowed waivers of rights under anti-discrimination statutes that *Gardner-Denver* had stated were unwaivable by anyone. *Wright*, 525 U.S. at 76-77. Moreover, the Court itself adverted to the change in its own receptivity to arbitration, with *Gilmer* being a prominent example. *Id.* Nonetheless, the *Wright* Court left this conflict unresolved, and decided the case before it on a different, narrower ground. *Id.*

In the absence of further guidance from this Court, the Second Circuit plainly erred in relying on *Gardner-Denver* rather than *Gilmer*. *Gilmer* drew three distinctions between itself and the *Gardner-Denver* line of cases, all of which made it, not *Gardner-Denver*, controlling here. First and foremost, in *Gardner-Denver*, the union and the company could arbitrate only contractual grievances, as they had no agreement to arbitrate statutory claims. In fact, the arbitrator did not even have the *authority* to resolve such claims, being only a "proctor of the [collective bargaining agreement]." *Gardner-Denver*, 415 U.S. at 53. Thus, the only question presented in that case (and its progeny) was whether arbitration of the employee's *contract*-based claims would be held to preclude later *statutory* discrimination actions arising out of the same facts. *See Gilmer*, 500 U.S. at 43. Under those circumstances, *Gardner-Denver* correctly held that there was no preclusion.

Here, in stark contrast, there is an agreement that expressly requires arbitration of any and all statutory claims, and the legally-trained arbitrators are empowered (and, indeed, obligated) to decide such claims "apply[ing] appropriate law." App. 48a. The question, therefore, is one of enforceability of forum selection clauses, not preclusion.

Second, *Gilmer* emphasized the fact that unlike *Gardner-Denver*, it was decided under the FAA. *See Gilmer*, 500 U.S. at 35. The FAA was enacted to place arbitration agreements upon the same footing as other commercial contacts. To that end, it provides for stays of proceedings in federal courts when an issue is referable to arbitration, *id.* § 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, *id.* § 4. In finding that the employee's ADEA claims should be compelled to arbitration, *Gilmer* cited to a litany of decisions by this Court holding that by agreeing to arbitrate a statutory claim, a party does not forgo any substantive rights afforded by the statute. *Id.* This Court has since further bolstered support for arbitration of statutory discrimination claims in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), holding that agreements to arbitrate employment disputes are fully enforceable pursuant to the FAA. After *Circuit City*, it is clear that clauses like the instant one are best treated under the FAA, as the decision below understood.

Finally, as a third distinction between itself and *Gardner-Denver*, *Gilmer* explained that since the arbitration in *Gardner-Denver* arose in the context of a collective bargaining agreement, where the claimant was represented by his union, that case presented a "tension between collective representation and individual statutory rights." *Gilmer*, 500 U.S. at 35. The decision below echoed the same concern, that if "the Union refused to submit the wrongful transfer claims to arbitration because the Union had agreed to the new contract, the interests of the Union and the interests of [Respondents] are clearly in conflict." App. 11a n.5.

But the Second Circuit ignored a critical distinction between the agreement at issue in *Gardner-Denver* and the CBA: under the CBA, Respondents retained at all times the right to bring their statutory claims to arbitration on their own – without the need for Union consent. App. 42a. Hence, Respondents enjoyed the same access to the arbitration process as the non-union employees in *Gilmer*, in which arbitration was upheld. Moreover, in the thirty years since *Gardner-Denver*, other judicial protections of the individual union member have developed. First, an employee who believes the union acted unfairly (in not processing, or improperly handling, a discrimination claim) can bring a duty of fair representation action against it. *See Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1998); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).[3] Similarly, in those relatively rare cases where a union member may wish to challenge the fairness of the arbitration process, courts are empowered to determine whether the process was in fact fair, and whether the decision was rendered by a neutral, unbiased adjudicator. *See Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002). Finally, under existing law, an agreement to arbitrate statutory discrimination claims by an employee does not waive an employee's right to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), and does not prohibit the EEOC from commencing a lawsuit in response to the charge. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

In addition to disregarding these critical distinctions, placing the instant case closer to *Gilmer* than to *Gardner-Denver*, the Second Circuit simply failed to appreciate that *Gilmer* and its progeny have undermined *Gardner-Denver*'s precedential weight. One of *Gardner-Denver*'s animating reasons for opposing arbitration agreements was its view that "there can be no prospective waiver of an employee's rights under Title VII." *Id.* at 51. *Gilmer* flatly rejected this principle, holding that arbitration of (and hence waiver of a judicial forum regarding) statutory discrimination claims was not inconsistent with the framework and purposes of the anti-discrimination laws. *See Gilmer*, 500 U.S. at 27.

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[3] Indeed, Respondents brought such a claim here, but then withdrew it. *See* note 2 *supra*.

In particular, the ADEA directs the EEOC to pursue "informal methods of conciliation, conference, and persuasion" in its enforcement procedures. 29 U.S.C. § 626(b). Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts also evidences an objective of allowing multiple *fora* for resolving disputes. *Gilmer*, 500 U.S. at 30. Finally, Congress has never explicitly precluded arbitration of ADEA claims.[4] For all these reasons, arbitration of age discrimination claims is not only permissible, but encouraged.

As to union-negotiated waivers in particular, *Gardner-Denver* stated that a union cannot waive individual employee rights, but only "certain statutory rights related to collective activity," 415 U.S. at 51. That view was subsequently called into question by the Court's decision in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 706-07 (1983), which held that a union *can* waive an individual employee's right under the National Labor Relations Act to be free of discrimination based on union activity. The Court decided that as long as the union-negotiated waiver is "clear and unmistakable," it would be enforced. Not coincidentally, this is the same standard the *Wright* Court used to evaluate union-negotiated arbitration agreements.

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[4] Indeed, in further support of arbitration, Congress passed the Civil Rights Act of 1991 which provided that "the use of alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and the ADEA]." Pub. L. 102-166, § 118, 105 Stat. 1071, 1081 (reprinted in notes to 42 U.S.C. § 1981). On its face, Section 118 evinces a clear Congressional intent to encourage arbitration of ADEA claims, not to preclude such arbitration. *See Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 54 n.4 (7th Cir. 1995).

At a more fundamental level, decisions after *Gardner-Denver* rejected its idea that the right to a judicial forum was a substantive right. As *Gilmer* held, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Gilmer*, 500 U.S. at 26. For that reason, and the others expressed above, much of the underlying motivation for *Gardner-Denver's* hostility to arbitration has simply faded away as the law has evolved over the last thirty years.

B. The Lower Federal Courts are in Irreconcilable and Acknowledged Conflict.

The decision below directly and irreconcilably conflicts with the Fourth Circuit's rulings that union-negotiated arbitration agreements *are* enforceable. The Fourth Circuit has been steadfast in its position, both pre- and post-*Wright*, applying the rationale of *Gilmer* rather than *Gardner-Denver* to collective bargaining agreements. The guidance and drafting instructions detailed in its decisions have become a primer for labor-relations practice throughout the country.

Even before *Wright*, the Fourth Circuit definitively ruled that union-negotiated waivers of an individual's right to proceed in a judicial forum for statutory discrimination claims are enforceable. In *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996), the Fourth Circuit determined that *Gardner-Denver* could not survive *Gilmer*. Reasoning that *Gilmer* "recognized that arbitration of a statutory claim is not equal to giving up any right under a statute, [but] simply another forum in which to resolve the dispute," *id.*, the Fourth Circuit held that *Gilmer* had rejected the principal basis of *Gardner-Denver*, that "arbitration is an inappropriate forum for the resolution of [anti-discrimination] statutory [rights]. . . ." *Id.* Following *Gilmer*, *Austin* noted that there was no evidence of a Congressional intent to prohibit arbitration of these matters, and therefore no reason to block enforcement of such an agreement. *Id.* at 880-81.

The Fourth Circuit's decision was grounded in the recognition that the mechanism for resolving employment disputes is a natural and appropriate subject of collective bargaining, and one over which a union – as the exclusive bargaining representative of its membership – has "the right and duty" to negotiate. As the court observed, the right to arbitrate is as much a term and condition of employment as any other protected by statute. *Id.* at 885. Waivers of such rights are effective because they rest on the premise of fair representation through the union.

Accordingly, the Fourth Circuit drew no distinction between the individual agreement to arbitrate upheld in *Gilmer* and the union-negotiated arbitration agreement at issue in *Austin*. The court held:

> Whether the dispute arises under a contract of employment growing out of securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate

> the dispute. So long as the agreement is voluntary, it is valid, and we are of the opinion it should be enforced.

Id. The Fourth Circuit thus rejected the precise grounds on which the Second Circuit rested its decision. To the Second Circuit, the identity of the party negotiating the waiver is determinative of whether the waiver is valid. *Rogers*, 220 F.3d at 75. To the contrary, *Austin* announced a uniform policy – so long as the agreement to waive a judicial forum was made voluntarily, individual agreements and collectively-bargained agreements are equally valid. *Austin*, 78 F.3d at 885.

In later cases, the Fourth Circuit has fortified and elaborated on its *Austin* holding, articulating the precise circumstances under which union-negotiated arbitration clauses are enforceable. In *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331 (4th Cir. 1999) (Wilkinson, J.), *cert. denied*, 540 U.S. 1074 (2000), the Fourth Circuit found two ways to meet *Wright's* "clear and unmistakable" test: one, by drafting an explicit arbitration clause whereby employees agree to submit to arbitration all federal causes of action arising out of their employment; and the other, by explicitly incorporating statutory anti-discrimination requirements elsewhere in the contract. This explicit drafting advice signals the court's continuing commitment to the enforcement of such agreements. *See, e.g., E. Associated Coal Corp. v. Massey*, 373 F.3d 530, 533 (4th Cir. 2004) ("We have consistently held that a union-negotiated CBA may waive an employee's statutory right to litigate his employment discrimination claims in a judicial forum."); *Singletary v. Enersys, Inc.*, 57 F. Appx. 161 (4th Cir. 2003);

Brown v. ABF Freight Sys., Inc., 183 F.3d 319, 321 (4th Cir. 1999) (Luttig, J.).[5]

In its most recent decision on point, *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 215 (4th Cir. 2007) (Wilkinson, J.), the Fourth Circuit went so far as to describe the method of dispute resolution as a "preeminent" term and condition of employment as to which unions were entitled to strike bargains. *Id.* at 216. It expressly rejected the idea that there was any statutory basis or precedent for inventing a rule that clear and unmistakable waivers require a "meeting of the minds" between the employer and individual union members. Indeed, it commented that to hold that Congress had placed the resolution of civil rights claims beyond the reach of arbitration "would be too much an exercise in judicial implication" – an exercise that would "change the nature of collective bargaining over conditions of employment and . . . read judicial exceptions into the National Labor Relations Act." *Id.* at 216-217. *See also Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308-09 (4th Cir.), *cert. denied*, 534 U.S. 995 (2001) ("[A]n agreement to arbitrate statutory claims is part of the natural tradeoff that a union must make in exchange for other benefits. . . . To redact one clause from a CBA would in effect alter the agreement reached during the often-difficult collective bargaining process.").

Despite the sea change in this Court's jurisprudence in the thirty years since *Gardner-Denver*, and the Fourth Circuit's insightful and practical holdings, most other circuits that have addressed the issue have aligned themselves with the Second Circuit – albeit while expressing uncertainty about the state of the law. *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 211 F.3d 1312 (D.C. Cir.) (en banc) (per curiam), *reinstating* 199 F.3d 477, 484 (D.C. Cir. 1999) ("Whatever the Supreme Court said – or more precisely, refrained from saying – in *Wright*, we do not understand the Court in *Gilmer* to have overruled *Gardner-Denver*. We therefore leave to the Court itself the prerogative of overruling its own precedent (if it will); we apply the law as it stands."), *cert. denied*, 121 S. Ct. 565 (2000); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 365 (7th Cir.) (Posner, J.) (acknowledging a "circuit split" and stating that "[o]n balance our case is closer to *Alexander*; but is enough left of *Alexander* to compel a decision in favor of plaintiff?"), *cert. denied*, 522 U.S. (1997); *Bratten v. SSI Servs., Inc.*, 185 F.3d 625 (6th Cir. 1999) (holding, anomalously, that this Court's decision in *Wright* "implicitly overruled" the Fourth Circuit's holding in *Austin*); *Albertson's Inc. v. United Food & Commercial Workers Union*, 157 F.3d 758 (9th Cir. 1998), *cert. denied*, 528 U.S. 809 (1999); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453-54 (10th Cir. 1997) (following *Gardner-Denver*); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997) (same).

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[5] The CBA clause at issue here incorporates both concepts in evincing its clear and unmistakable waiver. App. 43a-48a.

The Third Circuit is a likely exception. In *Martin v. Dana Corp.*, 114 F.3d 421 (3d Cir. 1997), a divided panel agreed with *Austin* that a union-negotiated arbitration clause could supplant an individual worker's right to a judicial forum. The en banc court vacated that opinion and referred the case back to the panel to determine whether the plaintiff could arbitrate without the assistance of the union. After determining that the agreement in that case did not grant that right, the original panel reversed its decision, ruling that the collective bargaining agreement did not bar the plaintiff's suit. *See Martin v. Dana Corp.*, 135 F.3d 765 (3d Cir. 1997), *reported in full at* 156 L.R.R.M. (BNA) 3137 (3d Cir. Dec. 16, 1997). Because the issue of the claimant's right to arbitrate without the consent of the union was "the sole issue . . . upon which [the] appeal turn[ed]," *id.* at *2, it appears that the Third Circuit would uphold the CBA here, as Local 32BJ union members have the right to bring their own attorneys into the arbitral forum. App. 42a.

In sum, the lower federal courts are in irreconcilable conflict over whether a union-negotiated arbitration clause may be enforceable. In addition to the sharp split between the positions of the Second and Fourth Circuit, other circuits have expressed deep-seated confusion regarding the enforceability of these waivers. Even courts that continue to apply *Gardner-Denver* do so while questioning its continued viability. This Court's review is needed to resolve the conflict.

C. State Courts Are In Conflict With Federal Courts.

The unsettled nature of the law has produced not only a federal circuit split, but also a split between several federal and state courts sitting in the same geographic location. Since state courts have the authority to decide federal discrimination claims, *see Gilmer* (holding that concurrent jurisdiction exists in state and federal courts to decide ADEA claims); *Yellow Freight*

Sys., Inc. v. Donnelly, 494 U.S. 820 (1990) (same for Title VII claims), this conflict raises the specter that the law could be applied in inconsistent ways – depending on whether the claim was brought in federal or state court.

In reliance on this Court's precedents, New York State courts have held under the FAA that clear and unmistakable union-negotiated agreements to arbitrate statutory discrimination claims are enforceable. *See, e.g., Garcia v. Bellmarc Prop. Mgmt.*, 745 N.Y.S.2d 113 (App. Div. 2002) (enforcing an arbitration agreement drafted by the same parties to this action and containing waiver language identical to the CBA because "*Gardner-Denver* . . . was not decided under the FAA, and does not reflect modern Federal policy favoring arbitration") (citing *Gilmer*); *Sum v. Tishman Speyer Props., Inc.*, Docket No. 11079-2005 (Sup. Ct. N.Y. Co. Dec. 2, 2005); *Lewandowski v. Collins Bldg. Servs. Inc.*, Docket No. 104657/00 (Sup. Ct. N.Y. Co. Dec. 6, 2000). These holdings place New York State courts in direct conflict with the Second Circuit.

Similarly, the Ohio State courts are in conflict with the Sixth Circuit. *Compare Minnick v. City of Middleburg Heights*, No. 81728, 2003 Ohio App. LEXIS 4569 (Ohio Ct. App. Sept. 25, 2003) (holding, in accordance with *Wright*, that clear and unmistakable union-negotiated waivers of statutory claims are enforceable), *with Bratten*, 185 F.3d 625. In California, the state courts are in conflict with the Ninth Circuit. *Compare Zavala v. Scott Bros. Dairy, Inc.*, 49 Cal. Rptr. 3d 503, 511 n. 9 (Ct. App. 2006) (acknowledging that a union may waive its members' rights to a judicial forum for employment discrimination claims pursuant to *Wright*), *with Albertson's,* 157 F.3d 758.

To have federal and state courts sitting in the same locality apply the same law inconsistently undermines uniformity and raises the specter of forum shopping. These dangers reinforce the need for this Court's review.

II. UNCERTAINTY ABOUT THE ENFORCEABILITY OF ARBITRATION AGREEMENTS CREATES SERIOUS POLICY CONCERNS.

A. The Adverse Effect on Employers, Unions, and Unionized Employees.

Continued conflict regarding the enforceability of union-negotiated arbitration agreements hampers the day-to-day operations of businesses and labor organizations. Many of this country's industries, such as the real estate and building services industry, operate in more than one federal circuit. In particular, many of the building service companies covered under the CBA operate throughout the country, including in both New York City (Second Circuit) and Virginia (Fourth Circuit). These multi-circuit businesses must adhere to different collective bargaining obligations and employee policies in circuits whose rulings are in conflict.

Labor organizations are also compelled to alter bargaining strategies and modify practices to administer collective bargaining agreements across jurisdictions. Following the lead of corporate America, unions are consolidating. For example, New York City-based Local 32BJ now has jurisdiction for building service employees all along the East Coast. Absent this Court establishing a uniform position for all circuits to follow, the prospect of devising a standard dispute resolution procedure for an entire region is exceedingly remote.

Further, as many current collective bargaining agreements cover employees located in more than one judicial circuit, an absence of uniformity among the circuits causes confusion within bargaining relationships. For example, the CBA covers employees in New York (Second Circuit) and New Jersey (Third Circuit). Absent this Court's guidance, the clause presently might be enforceable with respect to employees working in the latter but not the former, even though all these employees are working for the *same* employer and are represented by the *same* union.

Sound policy should support the ability of business to apply consistent practices across federal judicial circuits; the ability of labor organizations to advance consistent goals across federal judicial circuits; and the ability of labor and management to pursue mature relationships, such as the one between Local 32BJ and the RAB, whereby they can resolve employee disputes without disruption.

B. The Adverse Effect on Labor-Management Relations.

The Second Circuit's decision could prove highly detrimental to labor-management relations. In circuits that do not enforce union-negotiated waivers, an employer would seemingly be able to bypass the union as the employees' bargaining agent. Employers could require unionized employees to sign individual arbitration agreements as a condition of employment – in the same manner that non-unionized employees can be compelled to do under *Gilmer* and its progeny.

In particular, if a union cannot agree to an arbitration clause relating to statutory discrimination claims, it is well-established under labor law that such a term of employment becomes a non-mandatory subject of bargaining. *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 485 (D.C. Cir. 1999) ("[A] proposal to trade that which is not one's to give cannot be a mandatory subject of bargaining.") (citing *Brotherhood of R.R. Trainmen v. Akron & Barberton Belt R.R. Co.*, 385 F.2d 581, 603 (D.C. Cir. 1967) (holding proposal to bargain over effects of job terminations, normally a mandatory subject, non-mandatory because union "could not bargain away any part of the rights that accrued to employees under the [arbitral] Award")); *see also NLRB v. Wooster Div. of Berg-Warner Corp.*, 356 U.S. 342 (1958) (distinguishing between mandatory and non-mandatory subjects of bargaining). As with all non-mandatory subjects of bargaining, an employer would be permitted to present the arbitration agreement directly to its employees – bypassing the union. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). The employer, therefore, may be able to require its employees to sign the arbitration agreement in exchange for continued employment. *Gilmer*, 500 U.S. 20.

Following the Second Circuit's rule could strip unionized employees of their leverage that is only available through collective bargaining. An individual agreement to arbitrate clearly would be lawful under *Gilmer*, and the concept of bypassing the union to implement such an agreement unilaterally already has been approved by the District of Columbia Circuit in the context of the Railway Labor Act. *Air Line Pilots Ass'n, Int'l*, 199 F.3d at 486. Marginalizing the union would prove highly destabilizing to labor-management relations, and would in no way serve the ultimate ends of the ADEA or other anti-discrimination statutes.

CONCLUSION

For all the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED AUGUST 1, 2007

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Docket Nos. 06-3047-CV(L), 06-3106-CV(CON)

Steven PYETT, Thomas O'Connell,
and Michael Phillips,

Plaintiffs-Appellees,

v.

PENNSYLVANIA BUILDING COMPANY, 14 Penn Plaza, LLC, and Temco Service Industries, Inc.,

Defendants-Appellants.

Argued: June 27, 2007.
Decided: Aug. 1, 2007.

Before CABRANES and RAGGI, Circuit Judges, and KORMAN,[1] District Judge.

JOSÉ A. CABRANES, Circuit Judge.

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[1] The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

In this appeal, defendants challenge an order of the United States District Court for the Southern District of New York (Naomi Reice Buchwald, *Judge*) denying their motion to compel arbitration of plaintiffs' age discrimination claims in accordance with the collective bargaining agreement between plaintiffs' union and their employer. Defendants argue that the District Court, which relied on the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), and our Court's decision in *Rogers v. New York University*, 220 F.3d 73 (2d Cir.2000), failed to take into account the Supreme Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), and *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 119 S.Ct. 391, 142 L.Ed.2d 361 (1998). We disagree, and reaffirm our decision in *Rogers* that mandatory arbitration clauses in collective bargaining agreements are unenforceable to the extent they waive the rights of covered workers to a judicial forum for federal statutory causes of action.

BACKGROUND

The following facts are not disputed by the parties.

Plaintiffs are employees of Temco Services Industries ("Temco"), a building service and cleaning contractor. Before August 2003, they worked as night watchmen in a commercial office building owned by Pennsylvania Building Company and 14 Penn Plaza LLC (jointly, the "Company"). Since that time, they have been working as night porters and light duty cleaners in the same building.

Plaintiffs are members of Local 32BJ of the Service Employees International Union ("Union"), and they are covered by the collective bargaining agreement ("CBA") between the Union and the Realty Advisory Board on Labor Relations, Inc. ("RAB"), the multi-employer bargaining association of the New York City real estate industry. The CBA contains a mandatory arbitration clause for discrimination claims, which provides as follows:[2]

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles

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[2] From 1999 on, each CBA between the Union and the RAB has included a mandatory arbitration clause for discrimination claims.

> V and VI [of the CBA]) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

In or about August 2003, the Company engaged Spartan Security, a security services contractor and affiliate of Temco, to provide certain security personnel, including night watchmen, for the building. Spartan brought in new employees, and plaintiffs, who had been employed as night watchmen, were reassigned to different locations and less desirable positions as night porters and light duty cleaners within the building.

Plaintiffs filed grievances with the Union under the CBA. They claimed that, as the only building employees over the age of 50, they were wrongfully transferred and denied overtime in violation of various provisions of the CBA, including the provision that prohibited discrimination on the basis of age. Plaintiffs' grievances were submitted to arbitration before the Contract Arbitrator, Earl Pfeffer, who held hearings on eight occasions between February 2, 2004 and March 7, 2005. Shortly after arbitration began, the Union declined to pursue plaintiffs' claims of wrongful transfer and age discrimination, electing to pursue only the claims regarding denial of overtime on behalf of all plaintiffs and wrongful denial of promotion on behalf of plaintiff Pyett. According to plaintiffs, the Union's counsel explained to them that "since the Union had consented to Spartan Security being brought into the building," the Union could not contest their replacement as night watchmen by personnel of Spartan Security. On August 10, 2005, the Contract Arbitrator issued his Opinion and Award, denying plaintiffs' arbitrated claims in their entirety.

On May 26, 2004, while the arbitration was ongoing, but after the Union declined to submit the age discrimination claims, plaintiffs filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a Dismissal and Notice of Rights on June 29, 2004 for plaintiffs Phillips and O'Connell and on September 14, 2004 for plaintiff Pyett. In each case, the EEOC determined that its "review of the evidence . . . fail[ed] to indicate that a violation ha[d] occurred," and notified each plaintiff of his right to sue. On September 23, 2004, plaintiffs commenced this action against the Company and Temco in the District Court, pursuing those claims that the Union did not submit to arbitration. Plaintiffs alleged that they had been transferred from their positions and replaced by younger security officers in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* , the New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq.* , and the New York City Administrative code, N.Y.C. Admin. Code § 8-107.

Defendants moved for dismissal for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6), and, in the alternative, to compel arbitration, pursuant to 9 U.S.C. §§ 3 and 4. In an order dated May 31, 2006, the District Court denied both motions. With respect to defendants' motion to compel arbitration, the District Court referred to its decision in *Granados v. Harvard Maintenance, Inc.*, No. 05 Civ. 5489, 2006 U.S. Dist. LEXIS 6918 (S.D.N.Y. Feb. 22, 2006), where it "concluded based largely on binding Second Circuit precedent that even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." *Pyett v. Pennsylvania Building Co.*, 04 Civ. 7536, 2006 U.S. Dist. LEXIS 35952, *11 (S.D.N.Y. June 1, 2006). In *Granados*, the District Court relied principally on our Court's opinions in *Fayer v. Town of Middlebury*, 258 F.3d 117 (2d Cir.2001), and *Rogers.*[3] The District Court recognized the distinction our Court has drawn between arbitration clauses in individual contracts, which are governed by a line of Supreme Court cases represented by *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), and arbitration clauses in CBAs, which are governed by a line of Supreme Court cases represented by *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). *See Granados,* 2006 U.S. Dist. LEXIS 6918, at *11-14 (citing *Fayer,* 258 F.3d at 122). The District Court, following *Rogers,* held that union-negotiated waivers of statutory rights in CBAs were unenforceable and denied defendants' motion to dismiss. *Id.* at *15-22. Pursuant to 9 U.S.C. § 16(a)(1)(A) and (B), defendants timely appealed the District Court's May 31, 2006 order denying their motion to compel arbitration.

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[3] *Gardner-Denver* held that a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress-in that case, a cause of action created by Title VII. *See Gardner-Denver*, 413 U.S. at 49-51. *Gilmer* held that an individual employee who had agreed individually to waive his right to a federal forum *could* be compelled to arbitrate a federal age discrimination claim. *See Gilmer*, 500 U.S. at 33-35. In *Wright*, the Supreme Court held that a collective bargaining agreement could not waive covered employees' "rights to a judicial forum for federal claims of employment discrimination" absent a "clear and unmistakable waiver" of those rights. *Id.* at 82. It declined to resolve the tension between *Gardner-Denver* and *Gilmer*, however, instead deciding that it would "not reach the question whether such a [clear and unmistakable] waiver would be enforceable." *Id.*

In *Rogers*, we applied *Wright* to hold that an arbitration provision in a collective bargaining agreement could not waive an employee's right to assert local, state, and federal statutory

(Cont'd)

DISCUSSION

Defendants argue that *Rogers* left open the question of whether an arbitration clause in a CBA that clearly waives a covered worker's right to a judicial forum with respect to statutory claims is enforceable. They contend that such waivers are enforceable under *Gilmer,* which, they argue, overturned the holding in *Gardner-Denver.*

(Cont'd)

employment discrimination claims in federal court. *See* 220 F.3d at 75-77. In *Fayer,* we held that, under *Wright,* a collective bargaining agreement could not bar a covered employee from pursuing a First Amendment claim in federal court because it did not clearly and unmistakably waive the employee's right to pursue the claim. *See* 258 F.3d at 123.

While conceding that in *Gilmer* the Supreme Court dealt only with contracts signed by individuals and not CBAs, defendants claim, *see* Appellants' Br. 12, that in *Wright* the Supreme Court made clear its abandonment of *Gardner-Denver's* rule that a union may only "waive certain statutory rights related to collective activity, such as the right to strike," *Gardner-Denver,* 415 U.S. at 51, 94 S.Ct. 1011. We disagree. Our Court in *Rogers* squarely decided that a union-negotiated mandatory arbitration agreement purporting to waive a covered worker's right to a federal forum with respect to statutory rights is unenforceable. We took full account of both *Gilmer* and *Wright* and concluded that the Supreme Court's decision in *Gardner-Denver* remains good law. Our conclusion in *Rogers* was an alternative holding, not *dicta*, and continues to bind our Court. In any event, none of the cases relied upon by defendants persuades us that this holding in *Rogers* was incorrect.

In *Rogers,* we considered two issues: whether a mandatory arbitration clause in a CBA is enforceable generally, and whether the language of the particular clause at issue was a "clear and unmistakable waiver" under *Wright,* 525 U.S. at 80, 119 S.Ct. 391. We held first that *Gardner-Denver* still governed arbitration provisions in CBAs, notwithstanding the Supreme Court's holding in *Gilmer* that an employee who agreed to waive his individual right to a federal forum could be compelled to arbitrate an age discrimination claim. *See Rogers,* 220 F.3d at 75 (discussing *Gilmer,* 500 U.S. at 23). Second, we held that the language of the waiver at issue in that case was not "clear and unmistakable" under *Wright. See id.* at 77. We explained that *Gardner-Denver* had not been overruled by *Wright. Rogers*, 220 F.3d at at 75 ("[W]hile *Wright* may have called *Gardner-Denver* into question, it did not overrule it."); *see also Wright,* 525 U.S. at 82, 119 S.Ct. 391 ("We do not reach the question whether such a waiver [under a CBA] would be enforceable.").

Defendants focus on our comment in *Rogers* that *Wright* "could be taken to suggest that, under certain circumstances, a union negotiated waiver of an employee's statutory right to a judicial forum might be enforceable." Appellants' Br. 13 (quoting *Rogers,* 220 F.3d at 75). But they ignore our holding, in reliance on *Wright* and *Gardner-Denver,* that arbitration provisions contained in a CBA, which waive employees' rights to a federal forum with respect to statutory claims, are unenforceable. Defendants argue that our statements regarding the enforceability of arbitration provisions in CBAs were *dicta* because we also concluded that the clause at issue in *Rogers* was not "clear and unmistakable." This argument is without merit. We explicitly stated in *Rogers* that "the rule in *Gardner-Denver* was sufficient" to decide the case. *Rogers,* 220 F.3d at 75. An alternative conclusion in an earlier case that is directly relevant to a later case is not *dicta;* it is an entirely appropriate basis for a holding in the later case. Our reliance on *Gardner-Denver* in *Rogers* was an alternative holding; it was thus not *dicta. See MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 346 n. 4, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986) ("[S]ince the Superior Court did not rest its holding on only one of its two stated reasons, it is appropriate to treat them as alternative bases of decision [rather than *dicta].*"); *United States v. Fulks,* 454 F.3d 410, 434-35 (4th Cir.2006) (stating that an alternative conclusion in a prior case that bears directly on a subsequent case cannot be dismissed as *dicta*).

None of the other Supreme Court cases on which defendants rely casts doubt on our holding in *Rogers.* For example, they draw our attention to *Metropolitan Edison Co. v. N.L.R.B.,* 460 U.S. 693, 103 S.Ct. 1467, 75 L.Ed.2d 387 (1983), and *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001). *Metropolitan Edison* held that union officials may be bound by union-negotiated agreements to enforce no-strike agreements, and thus waive their right, guaranteed by the National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3), to be free of anti-union discrimination. *Metropolitan Edison,* 460 U.S at 708. However, rather than supporting the notion that individual rights may be waived by CBAs, as defendants claim, that holding is in line with the Supreme Court's observation in *Gardner-Denver* that unions "may waive certain statutory rights *related to collective activity, such as the right to strike.*" *Gardner-Denver,* 415 U.S. at 51 (emphasis added). *Circuit City* addressed an individual's employment contract, rather than a CBA, and therefore likewise does not address the issue before us now.[4]

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[4] After *Wright,* our sister circuits have not stepped much beyond *Gardner-Denver's* holding with regard to the

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In short, there is nothing that has changed in the nine years since *Wright* or the seven years since *Rogers* that compels us to reverse our ruling in *Rogers* that arbitration provisions contained in a CBA, which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable.[5]

(Cont'd)

enforceability of arbitration provisions in CBAs. *See, e.g., O'Brien v. Town of Agawam,* 350 F.3d 279, 285 (1st Cir.2003) ("The *Wright* Court declined to resolve this tension [between enforceability of mandatory arbitration clauses in individual contracts and those in CBAs], holding that even assuming a CBA can waive an employee's right to a federal forum, any such waiver must at a minimum be 'clear and unmistakable.' "); *Mitchell v. Chapman,* 343 F.3d 811, 824 (6th Cir.2003) ("Assuming *arguendo,* that the CBA mandates binding arbitration, it is well-established that the CBA must contain a 'clear and unmistakable waiver' of Mitchell's [Family and Medical Leave Act] rights to foreclose his entitlement to a judicial forum."); *Tice v. Am. Airlines, Inc.,* 288 F.3d 313, 317 (7th Cir.2002) (citing *Gardner-Denver,* but noting the ambiguity in the CBA language); *EEOC v. Ind. Bell Tel. Co.,* 256 F.3d 516, 522 (7th Cir.2001) (holding that "a union cannot surrender employees' rights under Title VII"). *But see E. Associated Coal Corp. v. Massey,* 373 F.3d 530, 533 (4th Cir.2004) ("[A] union-negotiated CBA may waive an employee's statutory right to litigate his employment discrimination claims in a judicial forum.").

5. The case before us illustrates why the Supreme Court may be reluctant to treat arbitration provisions in CBAs the same as arbitration provisions in individual contracts. If, as plaintiffs allege, the Union refused to submit the wrongful transfer claims to arbitration because the Union had agreed to the new contract,

(Cont'd)

CONCLUSION

For the foregoing reasons, the order of the District Court is affirmed.

(Cont'd)
the interests of the Union and the interests of plaintiffs are clearly in conflict. *See Gardner-Denver*, 415 U.S. at 58 n. 19, 94 S.Ct. 1011 ("[T]he interests of the individual may be subordinated to the collective interests of all employees in the bargaining unit.").

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED JUNE 1, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 04 Civ. 7536 (NRB)

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,

Plaintiffs,

- against -

PENNSYLVANIA BUILDING COMPANY,
14 PENN PLAZA LLC, and
TEMCO SERVICE INDUSTRIES, INC.,

Defendants.

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Steven Pyett, Thomas O'Connell, and Michael Phillips (collectively, "plaintiffs"), all of whom are over 50 years of age, bring this action against Pennsylvania Building Company ("PBC"), 14 Penn Plaza LLC (collectively, "the Company"), and Temco Service Industries, Inc. ("Temco") (collectively, "defendants") for age discrimination. Defendants now move to dismiss or compel arbitration and for sanctions. For the reasons set forth below, defendants' motions are denied.

BACKGROUND[1]

Plaintiffs are or were longstanding employees in the office building at 14 Penn Plaza, New York, New York (the "building"), who allege that in 2003 they were reassigned to less desirable positions because of their age.[2] Plaintiffs' Amended Complaint alleges that defendants engaged in age discrimination, in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"), the New York State Human Rights Law, N.Y. Exec. Law § 290, *et seq.* (McKinney 2005), and the New York City Administrative Code, N.Y.C. Admin. Code § 8-107.

Employment History

Pyett began working at the building in or about 1970, and since then he has been continuously employed there in various positions. Until his reassignment to work as a night porter in 2003, he had worked since 1989 as a night watchman. Am. Compl. ¶¶ 13, 14. O'Connell began working at the building in or about 1969 and was continuously employed there until he retired in 2004. *Id.* at ¶ 17. O'Connell also worked in numerous positions, and before his reassignment to work as a night porter in 2003, he had been working as a night watchman starting in 1992. *Id.* at ¶ 18. Phillips began working at the building in or about 1995 and had worked as a night starter until he was reassigned in 2003 to work as a light duty cleaner.[3] *Id.* at ¶ 35.

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[1] The following facts are drawn from plaintiffs' complaint and, as is appropriate when considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6), are assumed herein to be true.

[2] Plaintiffs Pyett and Phillips are still employed at the building, while O'Connell left employment in 2004. First Amended Complaint ("Amended Complaint" or "Am. Compl.") ¶¶ 14, 18, 22.

All three plaintiffs were and still are members of Local 32B-32J Service Employees International Union ("Local 32B-J"). *Id.* at ¶¶ 15, 19, 22. In addition, plaintiffs allege that at all relevant times, PBC and Temco were and are parties to a collective bargaining agreement ("CBA") with Local 32B-J covering the terms and conditions of plaintiffs' employment. *Id.* at ¶ 27.

Plaintiffs allege that in or about 1982 defendant Temco was engaged by defendant PBC to provide maintenance and cleaning services at the building. *Id.* at ¶ 23. At or about the same time, Pyett and O'Connell were transferred from the payroll of PBC to that of Temco. *Id.* at ¶ 24. Notwithstanding this payroll change, plaintiffs allege that they continued to receive their work assignments and were still supervised by PBC employees, including the building owner. *Id.* at ¶ 25.

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[3] We note that elsewhere, the Amended Complaint states that Phillips is currently employed as a night porter. *See id.* at ¶ 22.

Plaintiffs assert that in or about August 2003, Spartan Security[4] was engaged by PBC to provide security services at the building. *Id.* at ¶ 26. Shortly before this date, on or about July 23, 2003, plaintiffs Pyett and O'Connell were informed by PBC and Temco that they were being reassigned as night porters, while Phillips was told he would be reassigned as a light duty cleaner. *Id.* at ¶¶ 28, 32, 35. Plaintiffs allege that they were reassigned to "substantially less desirable" positions. *Id.* at ¶¶ 29, 36. In addition, Pyett and O'Connell allege that their reassignments led to "a substantial loss of income." *Id.* at ¶¶ 30, 33. In all three cases, plaintiffs allege that their former positions were given to Spartan employees who were much younger and had much less seniority at the building than them. *Id.* at ¶¶ 31, 34, 37.

Procedural History

In or about August 2003, plaintiffs filed grievances against defendants under the CBA, alleging that: (i) they had been reassigned to less desirable positions in violation of provisions which prohibited age discrimination; (ii) the Company violated seniority policies when it failed to promote either Pyett or O'Connell to the assistant mechanic position; and (iii) the Company failed equitably to rotate overtime. *Id.* at ¶ 38; Def. Mem. at 4. While all these grievances were initially submitted by Local 32B-J to arbitration, the union subsequently withdrew plaintiffs' age discrimination claim from arbitration by letter dated February 23, 2004, Am. Compl. ¶¶ 39 and 40, and proceeded with the remaining claims.

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[4] Plaintiffs allege that Spartan is a company "engaged in the business of providing building security services at various buildings located in the City of New York, and a subsidiary, department, related or affiliated company of the defendant Temco." *Id.* at ¶ 11.

On or about August 21, 2004, plaintiffs filed an action (No. 04 Civ. 6769(NRB)) in this Court against Local 32B-J and defendants, alleging that Local 32B-J had breached its duty of fair representation toward them by withdrawing their age discrimination grievance from arbitration. *Id.* at ¶ 41.

On or about May 18, 2004, plaintiffs jointly filed a complaint of age discrimination against defendants with the United States Equal Employment Opportunity Commission ("EEOC"). *Id.* at ¶ 42. The EEOC subsequently issued right to sue letters to plaintiffs, *id.* at ¶¶ 44-46, and on November 1, 2004 plaintiffs filed the Amended Complaint against defendants.[5]

On August 10, 2005, the arbitrator issued an Opinion and Award which denied the remaining grievances of Local 32B-J. *See* Plaintiffs' Letter dated September 12, 2005 ("Sept. 12, 2005 Letter"). Following the arbitrator's decision, plaintiffs discontinued their action (No. 04 Civ.

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[5] Defendants answered the Amended Complaint in March 2005.

6769(NRB)) against Local 32B-J and defendants. However, plaintiffs maintain that their claims in the instant action remain viable notwithstanding the arbitrator's decision. *See* Sept. 12, 2005 Letter. Defendants subsequently filed their motion on November 23, 2005.

DISCUSSION

I. Motion to Dismiss

In considering a motion to dismiss,[6] the Court must accept as true all material factual allegations in the complaint. *Levy ex rel. Immunogen Inc. v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir.2001). However, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002) (quoting *Gebhardt v. Allspect, Inc.*, 96 F.Supp.2d 331, 333 (S.D.N.Y. 2000)). A motion to dismiss may be granted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Still v. DeBuono*, 101 F.3d 888, 891 (2d Cir. 1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

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[6] Because we do not rely on any material outside the complaint in ruling on the motion, we decline to convert this motion into one for summary judgment. *See Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000).

Defendants assert in their papers that we should undertake the three-step burden shifting analysis established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04 (1973), in deciding their motion to dismiss. However, "[t]he prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 510, 122 S.Ct. 992, 997 (2002).[7] Accordingly, the Supreme Court has unanimously held that "an employment discrimination complaint need not include [specific facts establishing a prima facie case of discrimination] and instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief." ' *Leibowitz v. Cornell University,* 445 F.3d 586, 591 (2d Cir.2006) (quoting *Swierkiewicz,* 534 U.S. at 508) (brackets in original); *see also Galvez v. New York Mortgage Co.,* No. 05 Civ. 2365(DLC), 2005 WL 2124112, at *4 (S.D.N.Y. Sept. 1, 2005) ("[Defendant's] insistence that [plaintiff] must state a prima facie claim of race discrimination to survive a motion to dismiss must be rejected in light of *Swierkiewicz.*").

Therefore, our inquiry at this stage in the litigation is limited to whether the Amended Complaint provides defendants with fair notice of what the plaintiffs' claims are and the grounds upon which they rest. *See Swierkiewicz,* 534 U.S. at 512. Under this "simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Id.* at 514 (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229 (1984)); *see Braphman-Bines v. New York City Police Dept.,* No. 03 Civ. 10207(KMK), 2005 WL 22843, at *3 (S.D.N.Y. Jan. 3, 2005) ("Under *Swierkiewicz,* Rule 8 pleading is extremely permissive.") (quoting *Wynder v. McMahon,* 360 F.3d 73, 77 (2d Cir.2004)). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz* 534 U.S. at 512.

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[7] Defense counsel subsequently acknowledged the applicability of *Swierkiewicz* during oral argument.

We find that plaintiffs have satisfied these lenient standards, as they allege that plaintiffs were over the age of 40, that they were reassigned to positions which led to substantial losses in income,[8] and that their replacements were both younger and had less seniority at the building. *Cf. Vallone v. Banca Nazionale del Lavoro, N.Y. Branch,* No. 02 Civ. 6064(RCC), 02 Civ. 7102 (RCC), 2004 WL 2912887, at *3 (S.D.N.Y. Dec. 14, 2004). Although plaintiffs clearly will need evidence supporting these allegations to survive summary judgment, we cannot say that they have failed to meet the notice pleading standard required at this stage. Therefore, defendants' motion to dismiss is denied.

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[8] In the case of plaintiff Phillips, the Amended Complaint alleges that he was assigned to a "substantially less desirable position." Am. Compl. ¶ 36.

II. Motion to Compel Arbitration

Defendants alternatively move to compel arbitration in this matter, arguing that plaintiffs are bound by the terms of the CBA to arbitrate their claims. Plaintiffs assert that they are not bound by these union-negotiated terms and are free to litigate their claims before this Court. We recently addressed this very issue in *Granados v. Harvard Maintenance, Inc.*, No. 05 Civ. 5489(NRB), 2006 WL 435731 (S.D.N.Y. Feb. 22, 2006). There, we concluded based largely on binding Second Circuit precedent that even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable. In light of our reasoning in that case, defendants' motion to compel arbitration is denied.

III. Motion for Sanctions

In light of these conclusions, imposition of sanctions against plaintiffs would not be appropriate. Therefore, defendants' motion for sanctions is denied.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss or compel arbitration is denied, and their motion for sanctions is denied.

IT IS SO ORDERED.

Dated: New York, New York
May 31, 2006

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED FEBRUARY 22, 2006

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5489 (NRB)

LUZ GRANADOS,

Plaintiff,

- against -

HARVARD MAINTENANCE, INC.,

Defendant.

February 22, 2006, Decided
February 22, 2006, Filed

JUDGES: NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINION BY: NAOMI REICE BUCHWALD

OPINION

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Plaintiff Luz Granados ("plaintiff" or "Granados"), an office cleaner, has brought this action against her current employer, Harvard Maintenance, Inc. ("defendant" or "HMI"), which provides cleaning and maintenance services to commercial properties. Plaintiff alleges that defendant subjected her to disparate treatment based on her race, age, national origin, and gender and also retaliated against her in response to her request for leave pursuant to the Family and Medical Leave Act of 1993 ("FMLA") as well as her complaints of discrimination. Defendant now moves pursuant to Fed.R.Civ.P. 12(b)(1) & (6) to dismiss plaintiff's complaint. For the reasons set forth herein, defendant's motion is denied.

BACKGROUND[1]

Plaintiff is a 54 year old Hispanic woman who has been employed as an office cleaner by HMI since 2002. Compl. at ¶ 6. Plaintiff asserts claims under the FMLA; the New York State Human Rights Law, N.Y. Exec. Law § 290, *et seq.* (McKinney 2005); and the New York City Administrative Code, N.Y.C. Admin. Code § 8-107. Plaintiff alleges that she has been subjected to a hostile work environment and has suffered adverse employment actions based on her race, age, national origin, and gender. She also alleges that adverse actions were taken against her for requesting leave pursuant to the FMLA and in retaliation for her complaints of discrimination. *Id.* at ¶ 7.

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[1] The following facts are drawn from plaintiff's complaint and, as is appropriate when considering a motion to dismiss under *Fed.R.Civ.P. 12(b)(6)*, are assumed herein to be true.

I. Disparate Treatment and Harassment

Plaintiff alleges that since 2003 and continuing to the present day, defendant has taken various actions against her which it did not take against other, similarly situated employees. *Id.* at ¶ 8. Specifically, plaintiff alleges that her male, Albanian supervisor, Al (last name unknown), regularly used derogatory language in her presence. On a monthly basis, Al referred to Hispanics as "Spic." On a weekly basis, he referred to plaintiff as "dumb Hispanic." Virtually every day, he referred to plaintiff as an "old, weak woman" and referred to older male employees as "old and weak." On July 20, 2003, in front of several other employees, Al allegedly called plaintiff an "old Mexican woman" and a "clown" while using plaintiff's work cart to imitate an old woman. *Id.*

In addition, plaintiff asserts that during weekly inspections, defendant regularly allows three to four Albanian employees to work together to clean sites of comparable size to those which it requires one Hispanic employee to clean alone. Plaintiff and other Hispanic employees allegedly are then reprimanded for failure to do as good a job as the Albanians, even when this is not the case. On July 10, 2003, plaintiff alleges that she alone was suspended without pay for failing to properly clean her assigned area despite the fact that two Albanian women were working on the same area with her. *Id.*

From 2003 until the present, plaintiff alleges that defendant has forced her to vacuum nearly every day, even though Albanian employees were not required to do so. Plaintiff at one point allegedly produced a doctor's note stating that she should refrain from vacuuming because it was causing damage to her hands. Irregardless, defendant did not assign an Albanian co-worker assigned to the same work area to vacuum but instead forced plaintiff to continue vacuuming. *Id.*

Plaintiff alleges that on several occasions she complained both to HMI management and to her union that defendant subjected Hispanic employees to disparate treatment. In response, she alleges that she was told by management to "shut up and mind her own business." Plaintiff alleges that approximately twice a month thereafter, defendant harassed her and threatened her employment. *Id.* at ¶ 9.

II. FMLA Leave Request

On August 26, 2003, plaintiff requested two weeks of unpaid leave (which she alleges was the equivalent of FMLA leave), as well as two weeks of accrued vacation time in order to visit her terminally ill father in Colombia. Despite the fact that plaintiff's union delegate, Paul Romero ("Romero"), had "approved [her] paperwork" defendant denied the request. Plaintiff alleges that Romero told her the request was denied because she was Hispanic rather than Albanian. Romero then advised plaintiff to see Murat Mela ("Mela"), an Albanian who was the Assistant Vice President of HMI. *Id.* at ¶ 10.

Plaintiff alleges that when she went to Mela's office accompanied by her husband, Mela allegedly told plaintiff that she was a "troublemaker" and that she was "now going to be on [Mela's] troublemakers list." He then allegedly stated that he "[got] rid of [troublemakers]" and that plaintiff should not complain to the union about discrimination or FMLA leave because "all problems remain in house and anybody who goes outside is a troublemaker." *Id.* at ¶ 11.

III. Subsequent Events

On October 6, 2003 (presumably after she returned from her visit to her father), Al allegedly told plaintiff that she could not start her shift until she provided a copy of her father's death certificate to Mela. *Id.* at ¶ 12. Plaintiff produced one the following day, but she was then told that she would not be allowed to return to work until she provided a notarized English translation of the death certificate. *Id.* at ¶ 13.

Plaintiff eventually was allowed to return to work but then discovered that an Albanian woman had replaced her while she was away. Plaintiff also learned that the Albanian woman was allowed eight hours to complete the same job that plaintiff was required to perform within 7.5 hours.[2] *Id.* at ¶ 14.

In October 2003, during an inspection in which plaintiff and an Albanian woman were both assigned the same work area, Al reprimanded plaintiff because he claimed the area was not clean. Plaintiff alleges that only she was reprimanded, despite the fact that Al saw the Albanian woman sitting in an office instead of working. Plaintiff alleges that when she complained to Al about this, he told the Albanian woman, "[t]his Spanish bitch thinks she's going to do what she wants. I'm going to make her life miserable and if she says anything else I have orders from the office to get rid of her. I can get rid of her for anything. She's an old woman and a troublemaker." *Id.* at ¶ 15.

During the same month, Al again complained that plaintiff's work area was not properly cleaned. Plaintiff allegedly explained to him that her Albanian coworker refused to clean her portion of the assigned area. Although Al saw that the Albanian woman was not working, he told plaintiff to "mind her own business" and said that the Albanian woman could "do whatever she wants." Al allegedly threatened to issue a written reprimand to plaintiff if the floor was not cleaned when he returned. *Id.* at ¶ 16.

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[2] Defendant allegedly compensates employees on an hourly basis, *id.* at ¶ 14, but it is not clear whether the Albanian woman was paid at the same rate as plaintiff.

On March 11, 2005, plaintiff was suspended for three days for poor work performance. She alleges that when giving her the suspension, Al stated to her, "I told you I would get you. We are going to make an example out of you. This is coming from the office. Those were my orders." *Id.* at ¶ 17. During the same month, Al allegedly admitted to plaintiff that he had been ordered to make her life miserable. *Id.* at ¶ 18.

On April 13, 2005, plaintiff was suspended for one week for failing to properly clean her worksite. However, defendant failed to suspend plaintiff's "similarly-situated employees who were outside her protected class." In addition, Al allegedly stated to plaintiff that "[y]ou Hispanic people do not know how to clean. My people are perfect." Al also allegedly stated that if plaintiff went to the union she would be fired. *Id.* at ¶ 19. On April 15, 2005, while plaintiff was still serving her suspension, defendant suspended her again. *Id.* at ¶ 20.

On May 5, 2005, Al ordered plaintiff to lift heavy trash bags. When she asked him to assign someone else to assist her, he allegedly refused and threatened to "get your Hispanic ass out of this building." Fearful of losing her job, plaintiff complied, subsequently injuring her hand and foot as a result. *Id.* at ¶ 21.

Plaintiff alleges that as a result of her treatment, she has suffered and continues to suffer a loss of monetary and other benefits. She also alleges physical and emotional damages. *Id.* at ¶ 23.

IV. Collective Bargaining Agreement[3]

Throughout her employment with HMI, plaintiff has been represented for purposes of collective bargaining by Local 32B-32J, Service Employees International Union ("Local 32B-32J" or the "Union"). A collective bargaining agreement ("CBA" or "Agreement") between HMI and Local 32B-32J is in place which governs wages, hours, and other terms and conditions. The CBA directly references and requires compliance with the FMLA.[4] In addition, the CBA requires arbitration of disputes "arising between the parties as to interpretation, application or performance of any part of this Agreement and such other issues as the parties are expressly required to arbitrate . . . under the terms of this Agreement." Affidavit of Perry S. Heidecker, Esq. dated August 15, 2005 ("Heidecker Aff.") Ex. A at 6. The CBA also contains an anti-discrimination clause which states that:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national

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[3] The facts in this section, though not included in the complaint, are drawn from the contents of the CBA, of which we appropriately take judicial notice. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

[4] The Agreement states that "[a]ny Employer who is required by law to comply with the provisions of the Family Medical and Leave Act (FMLA) shall comply with the requirements of said act." Heidecker Aff. Ex. A at 36.

> origin, sex, sexual orientation, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, *or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations.*

Id. at 41 (emphasis added).

Defendant has moved to dismiss the complaint in its entirety. For the reasons set forth below, defendant's motion is denied.

DISCUSSION

In considering a motion to dismiss, the Court must accept as true all material factual allegations in the complaint. *Levy ex rel. Immunogen Inc. v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001). However, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002) (quoting *Gebhardt v. Allspect, Inc.*, 96 F.Supp.2d 331, 333 (S.D.N.Y. 2000)). A motion to dismiss may be granted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Still v. DeBuono,* 101 F.3d 888, 891 (2d Cir.1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

I. Waiver of Rights Generally

Defendant argues that plaintiff's complaint should be dismissed because the union-negotiated CBA designates arbitration as the sole and exclusive remedy for any disputes involving the subject matter of plaintiff's claims. As detailed in numerous cases, *see, e.g., Fayer v. Town of Middlebury,* 258 F.3d 117, 121-22 (2d Cir.2001), there has been some uncertainty about the enforceability of such provisions in light of two different lines of Supreme Court precedent. For purposes of this discussion, we summarize them briefly below.

The first line of cases involves "the preclusive effect of arbitrations conducted under collective bargaining agreements on subsequent litigation arising out of the same underlying facts." *Id.* at 121. This line is represented by *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 49 (1974), in which the Court held that an individual is not barred from bringing a Title VII action even if, pursuant to a nondiscrimination clause of a collective bargaining agreement, he previously arbitrated a grievance involving the same conduct.

The second line of cases deals with "the enforceability of individually executed predispute arbitration agreements on federal statutory and constitutional claims." *Fayer,* 258 F.3d at 122. This line is represented by *Gilmer v. Interstate/Johnson Lane Corp .,* 500 U.S. 20, 27 (1991), in which the Court held that a claim under the Age Discrimination in Employment Act of 1967 (ADEA) could be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration form, thus waiving the plaintiff's right to a federal judicial forum. There, the Court stated that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA ." *Gilmer,* at 26.

Subsequently, in *Wright v. Universal Maritime Svc. Corp* 525 U.S. 70, 72 (1998), the Supreme Court considered "whether a general arbitration clause in a[CBA] requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990(ADA)." Although the Court ultimately concluded that the employee was not obligated to use the arbitration procedure, it did not explicitly decide whether or not such a union-negotiated waiver of the employee's right to a judicial forum was valid. *Id.* at 77 ("we find it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us . . . that no such waiver has occurred"). Rather, it held that the waiver in question was not sufficiently clear and unmistakable such that, even assuming such waivers were enforceable, it would be valid. *Id.* at 80. In reaching its conclusion, the Court acknowledged the tension between the two prior lines of cases but did not resolve it.

Absent more explicit guidance from the Supreme Court, lower courts, including the Second Circuit, have distinguished these two lines of cases by asserting that the second line of cases "deal[s] not with arbitration clauses in collective bargaining agreements but with employees' own agreements to arbitrate specified disputes." *Fayer*, 258 F.2d at 122; *Rogers v. New York University*, 220 F.3d 73, 75 (2d Cir. 2000).

In addition, the Second Circuit has since considered the enforceability of an arbitration provision in a union-negotiated CBA. The Second Circuit concluded that the provision was not enforceable against the plaintiff's claims under the ADA, the FMLA, and New York State and City human rights laws. *Rogers*, 220 F.3d at 75 ("The arbitration provision in the instant case, by which employees purport to waive their right to a federal forum with respect to statutory claims, is contained in a union-negotiated CBA. . . . [S]uch provisions are not enforceable."). In reaching this conclusion, the Court stated that "the *Gardner-Denver* rule is sufficient to decide this case" and noted that "while *Wright* may have called *Gardner-Denver* into question, it did not overrule it." *Id.*

However, as an alternative rationale, it also affirmed the district court's conclusion that even if such provisions were enforceable as a general matter, the alleged waiver in that case was not sufficiently clear. *Id.* at 75-77. In reaching this conclusion, the Court articulated a two-step analysis of whether a waiver of statutorily conferred rights in a CBA is clear and unmistakable. Specifically, it held that a waiver in a CBA will be deemed sufficiently clear and unmistakable if either of two conditions is met. *Id.* at 76. "First, a waiver is sufficiently explicit if the arbitration clause contains a provision whereby employees specifically agree to submit all federal causes of action arising out of their employment to arbitration." *Id.* "Second, a waiver may be sufficiently clear and unmistakable when the CBA contains an explicit incorporation of the statutory anti-discrimination requirements in addition to a broad and general arbitration clause." *Id.*

Applying the two rationales of *Rogers,* we find that the arbitration provision at issue here is not enforceable as to any of plaintiff's statutory claims.

A. FMLA Claim

Broadly, the Second Circuit has already held that a union-negotiated arbitration clause in a CBA is unenforceable. *See Rogers,* 220 F.3d at 75; *Fayer,* 258 F.3d at 123 n. 2 ("In this Circuit, we have reached the question left open by *Wright* and held that an arbitration clause in a union collective bargaining agreement is not enforceable against an individual employee's ADA and Family and Medical Leave Act claims."); *see also Fowler v. Transit Supervisors Org.,* 96 Civ. 6796 (JGK), 2000 WL 1726687, at *1 (S.D.N.Y. Sept. 6, 2000) (noting that Second Circuit has "expressly held that collective bargaining agreement mandatory arbitration provisions cannot bar union members from bringing federal claims to court"). This binding precedent is sufficient to find that the arbitration clause in this case is unenforceable against plaintiff's FMLA claim. *See Rogers*, 220 F.3d at 75 (noting that "the *Gardner-Denver* rule is sufficient to decide this case"); *Beljakovic v. Melohn Props., Inc.*, 04 Civ. 3694(RJH), 2005 WL 2709174, at *1 (S.D.N.Y. Oct. 17, 2005) (finding that language requiring arbitration was "clear and unequivocal" but concluding that because CBA was negotiated between plaintiff's union and his employer, the arbitration provision was unenforceable).

Moreover, even assuming such an arbitration clause were enforceable, the provision in this case is not sufficiently explicit to waive plaintiff's right to assert her claim under the FMLA in federal court. The provision in relevant part states that it includes

> claims made pursuant to *Title VII of the Civil Rights Act*, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, *or any other similar laws, rules or regulations.*

Heidecker Aff. Ex. A at 41 (emphasis added). Although the provision references both federal and state statutory rights, it does not specifically incorporate claims made under the FMLA and also falls short of "a specific agreement to submit *all* federal claims to arbitration."[5] *Rogers*, 220 F.3d at 76 (emphasis added).

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[5] We do not consider the reference to "any other similar laws, rules or regulations" to be sufficiently explicit to

(Cont'd)

In addition, while the requirement in the CBA to abide by the FMLA may "creat [e] a contractual right that is coextensive with the federal statutory right," doing so does not necessarily "mak[e] compliance with the [federal statute] a contractual commitment that would be subject to the arbitration clause." *Wright*, 525 U.S. at 79, 81. In this case, the CBA's FMLA compliance provision and a separate provision for arbitration of disputes "arising between the parties as to interpretation, application or performance of any part of this Agreement and such other issues as the parties are expressly required to arbitrate . . . under the terms of this Agreement," Heidecker Aff. Ex. A at 6, are insufficient to constitute a clear waiver. *See Rogers*, 220 F.3d at 76 (noting that although the CBA expressly provided for FMLA compliance and elsewhere contained a general arbitration clause, it did not thereby make compliance with the FMLA a contractual commitment subject to arbitration). In light of the above, we find that the arbitration provision is unenforceable against plaintiff's FMLA claim, and she is entitled to bring this claim in federal court. Defendant's motion as to plaintiff's FMLA claim therefore is denied.

B. State Statutory Claims

Because the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, applies to this case, federal law

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(Cont'd)

incorporate the FMLA. We also note that in light of the fact that the drafters chose to specify certain federal claims, the exclusion of the FMLA is especially significant.

controls the analysis of whether the arbitration provision is enforceable against plaintiff's state statutory claims.[6] *See Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623, 631, 601 N.Y.S.2d 686, 689 (N.Y. 1993) (noting that "where the FAA is applicable, it preempts State law on the subject of the enforceability of arbitration clauses").

In the case of plaintiff's state statutory claims, the waiver contained in the CBA is sufficiently clear. The provision explicitly states that "claims made pursuant to . . . the New York State Human Rights Law[ ][and] the New York City Human Rights Code . . . shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations." Heidecker Aff. Ex. A at 41.

Therefore, we now confront an issue that many courts before us have been able to avoid. That is, in addressing plaintiff's state statutory claims, we must answer the question of whether a clear and unmistakable union-negotiated waiver is enforceable. As discussed above, the Supreme Court has not spoken clearly on this issue. However, we understand *Rogers* to hold that such union-negotiated waivers are unenforceable under the reasoning of *Gardner-Denver.* Therefore, in the absence of more explicit guidance from the Supreme Court, and in light of the Second Circuit's holding in *Rogers* that arbitration provisions contained in a union-negotiated CBA are unenforceable against statutory claims (including New York State and City human rights laws), we apply the reasoning of *Gardner-Denver* and find that such a waiver is unenforceable.[7] *See Rogers*, 220 F.3d at 75 ("When the arbitration provision has been negotiated by a union in a CBA, these courts have held that *Gardner-Denver* applies. The Second Circuit is no exception."); *Beljakovic*, 2005 WL 2709174, at *3 ("Simply put, there is no compelling authority for the proposition that *Gilmer* overruled *Alexander*, and until the Supreme Court clarifies that it has, this Court will apply the law as it stands." (citations and quotations omitted)); *see also Fowler*, 2000 WL 1726687, at *1 ("The Court of Appeals for the Second Circuit, however, has expressly held that collective bargaining agreement mandatory arbitration provisions cannot bar union members from bringing federal claims to court").

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[6] Neither party disputes that the FAA applies to this case. Because plaintiff "is an employee in a service industry which affects commerce, and is not engaged in the transportation industry" we agree. *Rogers v. New York University*, 98 Civ. 2089(WHP), 1999 WL 710777, at *2 (S.D.N.Y. Sept. 10, 1999), *aff'd*, 220 F.3d 73 (2d Cir. 2000); *see Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 982 (2d Cir.1997) ("Since collective bargaining agreements are contracts entailing transactions in commerce, the bargaining agreement in the instant case falls within the purview of the [FAA].").

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[7] We decline to adopt the approach set forth in *Fletcher,* 81 N.Y.2d at 632, 601 N.Y.S.2d at 690 (applying approach of *Gilmer* in case involving union-negotiated waiver because FAA applied to agreement at issue), which was decided before the Supreme Court's decision in *Wright.* Rather, we agree with the majority of courts applying *Wright* that the basis for the distinction between *Gardner-Denver* and *Gilmer* was not so much whether or not the FAA applied but the identity of the party negotiating the waiver. *See, e.g., Rogers,* 220 F.3d at 75 (noting that "most lower courts have focused on the party negotiating the waiver of rights").

While some state courts have found such provisions to be enforceable against state statutory claims, *see, e.g., Garcia v. Bellmarc Property Mgmt.,* 295 A.D.2d 233, 745 N.Y.S.2d 13 (1st Dep't 2002); *Torres v. Four Seasons Hotel of New York,* 277 A.D.2d 23, 715 N.Y.S.2d 28 (1st Dep't 2000), they did so based on their interpretation of the Supreme Court's holding in *Wright.* Until the Supreme Court speaks more clearly on this issue, however, we are constrained to adopt the Second Circuit's holding in *Rogers.*

Defendant's motion to dismiss plaintiff's state statutory claims therefore is denied.

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss is denied. Counsel are directed to appear for a conference on March 10, 2006 at 2:30pm.

SO ORDERED.

Dated: New York, New York
February 22, 2006

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

APPENDIX D — AFFIDAVIT OF LARRY ENGELSTEIN DATED NOVEMBER 21, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

04 CIV. 07536 (NRB)

STEVEN PYETT, THOMAS O'CONNELL AND
MICHAEL PHILLIPS,

PLAINTIFFS,

V.

PENNSYLVANIA BUILDING COMPANY,
14 PENN PLAZA LLC, AND
TEMCO SERVICE INDUSTRIES, INC.

DEFENDANTS.

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ECF CASE

AFFIDAVIT OF LARRY ENGELSTEIN

LARRY ENGELSTEIN, ESQ., being duly sworn, deposes and says:

1. I am currently employed as General Counsel of Local 32BJ, Service Employees International Union (the "Union"). As such, I am familiar with the circumstances of the arbitration before Arbitrator Pfeffer in the above identified matter and make this affidavit upon information directly known by me.

2. The Union withdrew any contractual grievance related to Plaintiffs' age discrimination claim before the arbitration hearing concluded.

3. The Union consents to the use of the Office of the Contract Arbitrator (OCA), created under the Collective Bargaining Agreement between the Realty Advisory Board of Labor Relations, Inc. and the Union, as the forum for Plaintiffs' private attorney to pursue Plaintiffs' statutory age discrimination claims, as long as the parties to this lawsuit, and not the Union, pay the costs associated with the arbitration.

s/ Larry Engelstein
Larry Engelstein, Esq.

APPENDIX E — EXCERPTS FROM THE 2005 CONTRACTORS AGREEMENT

2005

Contractors
AGREEMENT

Between

Service Employees
International Union
Local 32BJ AFL-CIO

AND

THE REALTY ADVISORY
BOARD ON LABOR
RELATIONS INC.

EFFECTIVE OCTOBER 1, 2004
TO DECEMBER 31, 2007

* * *

ARTICLE VI
Arbitration

1. There shall at all times be a Contract Arbitrator to decide all differences arising between the parties as to interpretation, application or performance of any part of this Agreement and such other issues as the parties are expressly required to arbitrate before him under the terms of this Agreement.

2. The fee of the Contract Arbitrator and all reasonable expenses involved in his functions shall be borne fifty percent (50%) by the Employer and fifty percent (50%) by the Union, except that in the event the Employer is in violation of any obligation under the provisions relating to the Health, Pension, Training, Legal and/or SRSF Funds, wages, dues and initiation fees, or any other violations involving damages, then the Employer shall pay the full fee of the Contract Arbitrator and all expenses in connection with the arbitration of the dispute, including, but not limited to, counsel fees, auditor's fees, arbitration costs and fees and court costs, plus a minimum of fifteen percent (15%) per annum on all monies awarded by the Contract Arbitrator.

3. The Arbitrator shall initially schedule a hearing after either party has served written notice upon the other that the grievance procedure has not resulted in an adjustment. The oath-taking and the period and the requirements for service of notice in the form prescribed by statute are hereby waived. The Arbitrator's award shall be made within thirty (30) days after the hearing closes. If the Arbitrator shall fail to render his written award within said thirty-day period, either party may serve a written demand upon him that the award must be made within ten (10) days after said demand. The decision shall be rendered within such additional ten (10) day period unless the parties consent to an extension in writing or an illness of the Arbitrator delays such decision. By mutual consent, the time of both the hearing and decision may be extended in a particular case. In the event of a willful default by either party in appearing

before the Arbitrator, after due written notice shall have been given to him, the Arbitrator is authorized to render his award upon the testimony of the adversary party.

Due written notice means mailing, faxing, telegraphing or hand delivery to the address of the employer furnished to the Union by the RAB.

4. The procedure herein outlined in respect to matters over which the Contract Arbitrator has jurisdiction shall be the sole and exclusive method for the determination of all such issues, and said Arbitrator shall have the power to grant any remedy required to correct a violation of this Agreement, including, but not limited to, damages and mandatory orders, and said Arbitrator shall have the further power in cases of willful violations (violations reflective of a deliberate intent to violate this Agreement) to award appropriate remedies, including, but not limited to, damages, all costs and expenses incurred by the Union in the processing of the grievance and arbitration proceedings, and to issue mandatory orders, the award of the Arbitrator being final and binding upon the parties and the employee(s) involved; provided, however, that nothing herein shall be construed to forbid either of the parties from resorting to court for relief from, or to enforce rights under, any arbitration award.

5. If any proceeding to confirm an award, service may be made by registered or certified mail within or without the State of New York as the case may be.

6. Should either party fail to abide by an arbitration award within two (2) weeks after such award is sent by registered or certified mail to the parties, either party may, in its sole and absolute discretion, take any action necessary to secure such award, including, but not limited to, suits at law. Should either party bring such suit, it shall be entitled, if it succeeds, to receive from the other party all expenses for counsel fees and court costs.

7. Grievants attending grievances and arbitrations during their regularly scheduled hours shall be paid during such attendance. If a grievant requires any employee of the building to be a witness at the hearing and the Employer adjourns the hearing, the employee witness shall be paid by the Employer for his regularly scheduled hours during attendance at such hearing. This provision shall be limited to one employee witness.

No more than one adjournment per party shall be granted by the Arbitrator without the consent of the opposing party.

All Union claims are brought by the Union alone, and no individual shall have the right to compromise or settle any claim without the written permission of the Union.

In the event that the Union appears at an arbitration without the grievant, the Arbitrator shall conduct the hearing provided it is not adjourned. The Arbitrator shall decide the case based upon the evidence adduced at the hearing.

Appendix E

There is presently an Office of the Contract Arbitrator-Building Service Industry as contract arbitrator for all disputes. It is agreed by the parties hereto that the arbitrators serving such office shall also serve as contract arbitrators under this Agreement. The arbitrators currently are:

John Anner, Stuart Bauchner, Noel Berman, Nicholas Cooney, John Dorsey, Howard Edelman, Robert Herzog, Theodore Lang, Marilyn Levine, Randi Lowitt, Earl Pfeffer and Bernard Young.

Upon thirty (30) days written notice to each other, either the Union or the RAB may terminate the services of any Arbitrator on the panel. Successor or additional Arbitrators shall be appointed by mutual agreement of the Union and the RAB. In the event of the removal, death or resignation of all of the Arbitrators, the successors or temporary substitute shall be chosen by the Union and the RAB. If the parties are unable to agree on a successor, then the Chairman of the New York State Employment Relations Board shall appoint a successor after consultation with the parties.

The costs of the Office of the Contract Arbitrator shall be shared equally in a manner determined by the Union and the RAB.

* * *

30. NO DISCRIMINATION

There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

* * * *

APPENDIX F — 9 U.S.C. §§ 3 & 4

9 U.S.C. § 3

§ 3. Stay of proceedings where issue therein referable to arbitration

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Appendix F

9 U.S.C. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 USCS §§ 1 et seq.], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such

arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

APPENDIX G — 29 U.S.C. §§ 621, 623(a), 626, 630

29 U.S.C. § 621

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 USCS §§ 621 et seq.;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 623

§ 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

Appendix G

29 U.S.C. § 626

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations. The Secretary [Commission] shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211).

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion. The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS § 623] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): Provided, That liquidated damages shall be payable only in cases of willful violations of this Act In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary [Commission] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary [Commission]; jury trial.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable

relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary [Commission] to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Secretary [Commission]; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary [Commission]. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) [29 USCS § 633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary [Commission] shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice. Section 10 of the Portal-to-Portal Act of 1947 [29 USCS § 259] shall apply to actions under this Act. If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) [29 USCS § 630(a)] against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver.

(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed

in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 [29 USCS § 623 or 633a] may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

Appendix G

29 U.S.C. § 630

§ 630. Definitions

For the purposes of this Act [29 USCS §§ 621 et seq.]—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the

National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term “employee” means an individual employed by any employer except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term “employee” includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term “commerce” means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term “industry affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

Appendix G

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

OPPOSITION BRIEF

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SUPREME COURT, U.S.

②

No. 07-581

IN THE
Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,

Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant the Petition herein to resolve the question of whether Respondents' union's third-party waiver of their right to sue in federal court for violation of federal, state and city anti-discrimination statutes, contained in the arbitration provision of the collective bargaining agreement by which they were covered, is enforceable, where the union did not submit their age discrimination claims to arbitration?

INTRODUCTION

This is not the appropriate case for the Court to determine whether a union negotiated waiver of its members' right to sue in federal court for alleged violation of federal, state and city anti-discrimination statutes, by requiring that such claims be submitted to arbitration, is enforceable, since, in this case, the union, after having initially submitted Respondents' age discrimination claims to arbitration, along with their other contractual claims, withdrew the age discrimination claims from arbitration. Then, after Respondents filed their Federal lawsuit herein, the union granted Respondents permission to litigate their age discrimination claims before the same arbitrator who heard their other contractual claims, but at their sole cost and expense, and with their own attorney. Since Respondents' age discrimination claims were withdrawn from arbitration by the union, the question of whether Respondents are required to pursue those claims in arbitration, rather than in a judicial forum, is not properly raised and should not be considered by this Court.

Any determination by the Court of whether it should go beyond its decision in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and hold that a clear and unequivocal union negotiated waiver of an employee's rights to litigate federal statutory age discrimination claims in a judicial forum contained in an arbitration provision of a collective bargaining agreement is enforceable against the covered employee, should be made only in a case where the union has actually submitted the discrimination claim for binding arbitration under the clause, and not, as here, where the claim was withdrawn from arbitration by the union prior to decision by the arbitrator. The permission granted by the union to Respondents, after they had already commenced their federal court action, to pursue their claims before the same arbitrator who heard their other contractual claims, but at their own cost and expense, and with their own privately retained counsel, merely afforded Respondents an option as to whether to proceed in court or before the arbitrator, but did not constitute an exercise by the union of the collectively bargained arbitration provision, thereby triggering the claimed waiver contained therein. Under these circumstances, the Court should deny the Petition and wait to resolve the issue of the enforceability of a union negotiated waiver contained in a mandatory arbitration provision of a collective bargaining agreement for a case in which arbitration has actually been invoked by the union to resolve the discrimination claim.

STATEMENT OF THE CASE

Respondents, long term employees of Petitioners at the Pennsylvania Building, known as 14 Penn Plaza, New York, New York, on September 23, 2004, brought this claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-634 ("ADEA"), the New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq.*, and the New York City Administrative Code, N.Y.C. Admin. Code § 8-107, alleging that they were discriminated against in the terms and conditions of their employment because of their age. Respondents alleged that they were wrongfully replaced by much younger workers, transferred to less desirable positions, and suffered significant loss of income.

Petitioners moved in the district court to dismiss the complaint for failure to state a claim, or in the alternative to compel Respondents to litigate their age discrimination claims under the arbitration provision of the collective bargaining agreement between their union, Local 32BJ Service Employees International Union, and the Petitioners' employer associations.

On May 31, 2006, the district court issued its Memorandum and Order denying Petitioners' motion to dismiss or to compel arbitration. Petitioners then appealed only the denial of their motion to compel arbitration to the Court of Appeals for the Second Circuit.

On August 1, 2007, the court of appeals affirmed the district court's denial of Petitioners' motion to compel arbitration, holding that under its determination in *Rogers v. New York University*, 220 F.3d 73 (2d Cir.), *cert. denied*, 531 U.S. 1036 (2000), the union's third-party waiver of Respondents' right to bring their claims for age discrimination under the ADEA, state and city laws in federal court, was unenforceable. *Rogers* relied upon this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), for its holding.

REASONS FOR DENYING THE PETITION

Prior to commencing their federal court action, Respondents filed grievances with their union alleging that their replacement by younger employees and transfer to other positions violated several provisions of the collective bargaining agreement, including the provision which prohibited discrimination based upon age. The union initially submitted all of Respondents' grievances, including their claims of age discrimination, to arbitration. However, shortly after the arbitration hearing began, counsel for the union notified the arbitrator and Respondents that their age discrimination claims were withdrawn. Respondents' remaining claims proceeded to decision by the arbitrator, and were denied by him.

After the union's withdrawal of their age discrimination claims from arbitration, Respondents filed this action in the district court, alleging violation by Petitioners of the ADEA, N.Y. Exec. Law and N.Y.C. Admin. Code. In support of their motion in the district court to compel arbitration, Petitioners submitted an affidavit of Larry Engelstein, counsel for the union. The affidavit confirmed that the union withdrew the contractual grievance related to Respondents' age discrimination claims before the arbitration hearing concluded. The affidavit also stated that

> "[t]he Union consents to the use of the Office of the Contract Arbitrator (OCA), created under the Collective Bargaining Agreement between the Realty Advisory Board of Labor Relations, Inc. and the Union, as the forum for Plaintiffs' statutory age discrimination claims, as long as the parties to this lawsuit, and not the Union, pay the costs associated with the arbitration."

Thus, it is clear that the union did not ultimately submit Respondents' age discrimination claims to arbitration under the union negotiated arbitration provision of the collective bargaining agreement. It is only the union which is empowered to invoke the arbitration provision of the collective bargaining agreement, and it is only the submission of a dispute to arbitration by the union which would trigger the collective bargaining agreement waiver, even if the waiver is found to be enforceable.

Since the union never submitted Respondents' age discrimination claims to arbitration, the union negotiated collective bargaining agreement waiver of their right to sue in court for alleged violations of the ADEA, state and city anti-discrimination statutes, is clearly unenforceable herein, and may not be relied upon by Petitioners to preclude them from litigating their age discrimination claims in a judicial forum.

Under these circumstances, this is not the appropriate case in which to determine whether a union negotiated waiver of its members' right to sue under federal anti-discrimination statutes contained in an arbitration provision of a collective bargaining agreement is enforceable against them.

CONCLUSION

Petitioners have not demonstrated that it is appropriate for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

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REPLY
BRIEF

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③

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No. 07-581

IN THE

Supreme Court of the United States

---

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,

Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Petitioners' Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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Transcribed Recording of Oral Argument
Before the Second Circuit,
Pyett v. Pa. Bldg. Co., 06-3047-cv(L),
(2d Cir. June 27, 2007) 2

Nothing in Respondents' brief challenges the fundamental importance or the timeliness of the question presented by this case: Whether unions may waive their members' rights to a federal forum for their statutory discrimination claims in exchange for other benefits offered by employers. Respondents' only argument is that they believe this is not an appropriate case to decide that question, although their reasons are unclear. In fact, none of Respondents' arguments calls into question the certworthiness of this case.

ARGUMENT

I. It Is Undisputed That Whether Union-Negotiated Arbitration Agreements Are Enforceable Is A Critical Question.

Respondents do not dispute that whether union-negotiated arbitration agreements are enforceable is a fundamental and urgent question this Court should resolve. They do not dispute that there is a deep and irreconcilable split between the Circuits on this issue – which has lasted for more than a decade – with the Fourth Circuit repeatedly holding that such agreements are enforceable so long as the waiver language is clear and unmistakable, and the Second and some other Circuits ruling that such agreements are *never* enforceable under any circumstances. Respondents do not deny that there is an unresolved tension in this Court's own precedents – as this Court itself has recognized. And they do not question that the conflict among the lower courts has adversely affected labor relations among employers, unions, and unionized employees, who currently must bargain against a backdrop of uncertainty about the law.[1]

There is no reason to expect that the conflict will diminish over time or that the issue will not recur. In the short time since the Second Circuit's decision below, two district courts have blocked similar arbitration agreements from taking effect. *See Selmanovic v. NYSE Group, Inc.*, No. 06 Civ. 3046, 2007 U.S. Dist. LEXIS 94963, at *24 (S.D.N.Y. Dec. 20, 2007); *Kravar v. Triangle Servs., Inc.*, 509 F. Supp. 2d 407 (S.D.N.Y. 2007) (holding that even pendent state-law discrimination claims that would be arbitrable in the New York State courts may not be the subject of a union-negotiated waiver of a federal judicial forum); *see also Manigault v. Macy's East, LLC*, 506 F. Supp. 2d 156, 160 (E.D.N.Y. 2007) (citing holding in decision below in non-collective bargaining context). As these cases demonstrate, the Second Circuit's decision continues to disrupt the legitimate expectations of parties to the collective bargaining process. Only a ruling from this Court can settle this matter.

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[1] Indeed, at oral argument before the Second Circuit, counsel for Respondents candidly remarked: "Whether or not the table is or is not set for changing the law – it is only the Supreme Court that can eat at that table." Transcribed Recording of Oral Argument Before the Second Circuit, *Pyett v. Pa. Bldg. Co.*, 06-3047-cv(L) (2d Cir. June 27, 2007).

II. This Case Is An Excellent Vehicle To Decide Whether A Union-Negotiated Agreement To Arbitrate Statutory Claims Is Enforceable.

Unable to deny that the legal question at stake is critically important, Respondents instead claim that this case is somehow not the right vehicle for resolving that question because of its procedural history. In August 2003, Respondents filed their grievances with the Union under the collective bargaining agreement ("CBA"), alleging both statutory age discrimination and contractual violations, which grievances were submitted to arbitration. App. 4a. In February 2004, shortly after arbitration began, the Union withdrew their age discrimination claims. While the remaining claims were still pending before the arbitrator, Respondents filed the instant action in federal court alleging age discrimination. The arbitrator denied all contractual claims in August 2005. *Id.* at 5a.

Based on this chronology, Respondents assert that the mandatory arbitration requirement of the CBA was not "triggered," because at the time Respondents filed their federal complaint, the Union had already withdrawn their age discrimination claims. Although the crux of their argument is far from clear, Respondents seem to believe that the arbitration requirement is optional – if the Union chooses not to arbitrate, then its members are not bound by the provision. Thus, Respondents argue that this case is not a good vehicle for resolution of the ultimate legal question, because even if the arbitration provision is enforceable, it did not apply to them.

This argument is factually and logically flawed. First, there is no basis whatsoever for Respondents' *ipse dixit* that the mandatory arbitration provision only applies when the Union submits claims before the arbitrator. As quoted in the Petition, the CBA states: "*All such claims* [of discrimination under federal, state, and local law] shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." App. 48a (emphasis supplied). There is no reference in the CBA to any "trigger" before the right to a judicial forum is waived, and Respondents do not cite any contractual language in support of their bald claim. Neither court below found that the Union must submit grievances to arbitration before judicial claims are foreclosed. Indeed, Respondents' perverse reading of the CBA would undermine the very purpose of having an arbitration provision in the first place. If the effect of the Union declining to arbitrate grievances is that the employees may litigate in federal court, then a judicial forum waiver has little value. Respondents' argument, untethered to case law or contractual language, would fundamentally alter the "preeminent" term and condition of their employment. *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 215 (4th Cir. 2007) (Wilkinson, J.).[2]

---

[2] If Respondents felt the Union's withdrawal of their discrimination claims was somehow unfair, the proper course of action was to file a Duty of Fair Representation claim against the Union, not to disregard their obligations pursuant to the arbitration provision. *See Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1998); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). In fact, Respondents did precisely that, only to later withdraw that claim with prejudice. App. 17a-18a.

Second, the possibility that there is such a "trigger" would not make this case any less certworthy. The upshot of Respondents' argument is that if this Court were to find the arbitration provision enforceable, they would still have a defense that the provision did not apply to them. But a holding by this Court as to the enforceability of such a provision would still be binding precedent for all future cases. Ordinarily, the fact that another legal defense exists at the trial level is not a reason to deny certiorari, especially where the proceeding is under the Federal Arbitration Act, which specifically contemplates the immediate appeal of a denial of a motion to compel arbitration, *see* 9 U.S.C. § 16(a)(1).

Respondents' prudential argument is particularly inappropriate in this context because the scope of an enforceable arbitration agreement is a matter in the first instance for the arbitrator, not for a court. That is, questions of procedural arbitrability are not subject to judicial review but instead are properly submitted to an arbitrator as part of the grievance/arbitration mechanism. As this Court has stated:

> "[I]n the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002). Out of respect for the different roles played by judicial actors and arbitrators, this Court should address the important substantive arbitrability issue squarely presented in the instant case without regard to any arguments pertaining to procedural arbitrability that Respondents may make to an arbitrator in the course of a later arbitration proceeding.

Contrary to Respondents' suggestion, the circumstances of this case in fact make it an ideal vehicle for this Court to decide the question presented. The union-negotiated arbitration agreement at issue clearly and unmistakably waived their right to bring statutory claims in federal court. App. 6a, 21a, 37a-38a. Nevertheless, the Union allowed Respondents to use the arbitration panel to present their claims through their private attorney. App. 42a.[3] This fact considerably mitigates the tension that may exist between union interests and individual rights, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991), making this case an excellent vehicle to decide whether a union-negotiated arbitration agreement is ever enforceable.

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[3] To clarify a point in the Petition, Petitioners note that while the Union exercised sole control to determine whether any grievances should be submitted to the arbitrator initially, in this case, after withdrawing the age discrimination claims, the Union made the Office of the Contract Arbitrator available to Respondents so that they, at their own expense, could have those claims heard. Respondents declined that offer.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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JOINT
APPENDIX

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No. 07-581

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and MICHAEL PHILLIPS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 30, 2007
CERTIORARI GRANTED FEBRUARY 19, 2008

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
(Foley Square)

CIVIL DOCKET FOR CASE #: 1:04-cv-07536-NRB

1. Complaint filed..............................September 23, 2004

6. Amended complaint filed.................November 1, 2004

12. 14 Penn Plaza LLC's Answer to amended complaint filed..March 4, 2005

21. Temco Services Industries, Inc's Answer to amended complaint filed.......................................March 10, 2005

28. 14 Penn Plaza LLC's Motion to dismiss or compel arbitration and for sanctions filed..November 23, 2005

29. Declaration of Brian S. Rauch in support re: 14 Penn Plaza LLC's to dismiss or compel arbitration and for sanctions filed................................November 23, 2005

30. Affidavit of Charles Borrok in support re: 14 Penn Plaza LLC's to dismiss or compel arbitration and for sanctions filed...................November 23, 2005

31. Affidavit of Larry Engelstein in support re: 14 Penn Plaza LLC's motion to dismiss or compel arbitration and for sanctions filed..November 23, 2005

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34. Temco Services Industries, Inc.'s motion to dismiss filed..November 23, 2005

38. Declaration of Jeffrey L. Kreisberg in opposition of motion to dismiss or compel arbitration and for sanctions filed...................................January 19, 2006

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45. Memorandum and Order denying Defendant's motion filed..June 1, 2006

47. 14 Penn Plaza LLC's notice of appeal from order on motion to dismiss filed.............June 28, 2006

49. Temco Services Industries, Inc.'s notice of appeal from order on motion to dismiss filed....June 29, 2006

US COURT OF APPEALS FOR THE SECOND CIRCUIT – GENERAL DOCKET

Judgment of the district court is affirmed by published signed opinion filed..August 1, 2007

Judgment filed..August 1, 2007

CAPTION OMITTED

FIRST AMENDED COMPLAINT

Plaintiffs, STEVEN PYETT ("Pyett"), THOMAS O'CONNELL ("O'Connell"), and MICHAEL PHILLIPS ("Phillips"), by their attorneys, Kreisberg Maitland & Thornhill, LLP, as and for their complaint herein, respectfully allege and show to this Court the following:

NATURE OF ACTION

1. This is a civil action arising under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, in which the plaintiffs allege that they were removed from their positions as night watchman (Pyett and O'Connell) and starter (Phillips) in the office building known as 14 Penn Plaza at 225 West 34th Street, New York, New York, and reassigned to less desirable positions in the building, at a substantial loss of pay, because of their age, in violation of 29 U.S.C. §623(a)(l), Section 296.1 of the New York State Executive Law (Human Rights Law), and Title 8, Chapter 8-107(l)(a) of the New York City Administrative Code.

JURISDICTION

2. This Court has jurisdiction over the federal claims in this action under 29 U.S.C. §626(c) and 28 U.S.C. 1331, and pendent jurisdiction over the New York State and New York City law claims.

VENUE

3. Venue is proper in this Court under 28 U.S.C. §1391 (b), since all of the defendants reside within this judicial district.

PARTIES AND RELATED ENTITIES

4. The plaintiff Steven Pyett is and was at all times relevant hereto an individual resident of the State of Pennsylvania, and a person within the meaning of 29 U.S.C. §630(a).

5. The plaintiff Thomas O'Connell is and was at all times relevant hereto an individual resident of the State of Pennsylvania, and a person within the meaning of 29 U.S.C. §630(a).

6. The plaintiff Michael Phillips is and was at all times relevant hereto an individual resident of the State of New York, and a person within the meaning of 29 U.S.C. §630(a).

7. Upon information and belief, the defendant Pennsylvania Building Company ("PBC"), is and was at all times relevant hereto a New York corporation located at 14 Penn Plaza, New York, New York, which itself or through one of its affiliated or related companies, is the owner of the building known as 14 Penn Plaza, New York, New York (the "building"), and an employer within the meaning of 29 U.S.C. §630(b).

8. Upon information and belief, the defendant 14 Penn Plaza, LLC is and was at all times relevant hereto located at 14 Penn Plaza, New York, New York, a New York limited liability

company, an affiliated company of the defendant Pennsylvania Building Company and an alter-ego thereof, and an employer within the meaning of 29 U.S.C. §630(b).

9. Upon information and belief, the defendant Temco Service Industries, Inc. ("Temco"), is and was at all times relevant hereto a New York corporation located at One Park Avenue, New York, New York, and an employer within the meaning of 29 U.S.C. §630(b).

10. Upon information and belief, Local 32B-32J Service Employees International Union ("Local 32B-J"), is and was at all times relevant hereto a labor organization located at 101 Avenue of the Americas, New York, New York, which represents for the purpose of collective bargaining building service employees in the City of New York.

11. Upon information and belief, Spartan Security is and was at all times relevant hereto engaged in the business of providing building security services at various buildings located in the City of New York, and a subsidiary, department, related or affiliated company of the defendant Temco.

FACTS

The Plaintiffs' Employment at the Building.

Pyett.

12. The plaintiff Pyett's date of birth was October 18, 1952.

13. He began working at the building in or about 1970, and has been continuously employed at the building from that date until the present.

14. The plaintiff Pyett has held various positions at the building, including elevator operator (1970-72), porter (1972-74), handyman (1974-76), night porter (1976-82), day elevator starter (1982-83), freight elevator operator (1983-84), night starter (1984-89), night watchman (1989-2003), and night porter (2003-present).

15. At all times during his employment at the building, Pyett was and still is a member of Local 32B-J.

O'Connell.

16. The plaintiff O'Connell's date of birth was June 19, 1942.

17. He began working at the building in or about 1969, and was continuously employed at the building from that date until in or about July 2004, when he retired.

18. The plaintiff O'Connell held various positions at the building, including security man (1969-1972), night watchman (1977-1982), handyman (1988-89), freight operator (1989-1992), night watchman (1992-2003), and night porter (2003-04).

19. At all times during his employment at the building, O'Connell was and still is a member of Local 32B-J.

Phillips.

20. The plaintiff Phillips' date of birth was February 28, 1948.

21. He began working at the building in or about 1995 and has been continuously employed at the building from that date until the present.

22. The plaintiff Phillips has held the positions of night starter (1995-2003) and night porter (2003 to the present) at the building, and at all times was a member of Local 32B-J.

Temco Is Hired to Provide Services at the Building.

23. Upon information and belief, in or about 1982 the defendant Temco was engaged by the defendant PBC to provide maintenance and cleaning services at the building.

24. Upon information and belief, at or about the same time that the defendant Temco began providing services at the building, the plaintiffs Pyett and O'Connell were transferred from the payroll of the defendant PBC to the payroll of the defendant Temco, although their positions were not changed.

25. That notwithstanding their aforesaid change from PBC's to Temco's payroll, the plaintiffs continued to receive their work assignments and take direction in the performance of their duties from supervisory employees of the defendant PBC, including the building owner.

26. Upon information and belief, in or about August 2003, Spartan Security was engaged by the defendant PBC to provide security services at the building.

27. Upon information and belief, at all times relevant hereto the defendants PBC and Temco were and are party to a collective bargaining agreement with Local 32B-J covering the terms and conditions of employment of the plaintiffs.

Plaintiffs Are Removed From Their Positions and Transferred to Less Desirable, Lower Paying Positions.

Pyett.

28. On or about July 23, 2003, the plaintiff Pyett was informed by the defendants PBC and Temco that his position at the building was being changed from night watchman to night porter, the position he presently holds, and his position was so changed effective that date.

29. The position of night porter at the building was and is a substantially less desirable position than the position of night watchman.

30. The change in the position of the plaintiff Pyett from night watchman to night porter has resulted in a substantial loss of income for him.

31. Upon information and belief, the position of night watchman at the building formerly held by the plaintiff Pyett was given by the defendants PBC and Temco to an employee of Spartan who is much younger than the plaintiff Pyett, and who

had much less seniority at the building than the plaintiff Pyett.

O'Connell.

32. On or about July 23, 2003, the plaintiff O'Connell was informed by the defendants PBC and Temco that his position at the building was being changed from night watchman to night porter, the position he held from that date until the date of his retirement, and his position was so changed effective that date.

33. The change in the position of the plaintiff O'Connell from night watchman to night porter resulted in a substantial loss of income for him.

34. Upon information and belief, the night watchman position at the building formerly held by the plaintiff O'Connell was given by the defendants PBC and Temco to an employee of Spartan who is much younger than the plaintiff O'Connell, and who had much less seniority at the building than the plaintiff O'Connell.

Phillips.

35. On or about July 23, 2003, the plaintiff Phillips was informed by the defendants PBC and Temco that his position at the building was being changed from night starter to light duty cleaner, the position he presently holds, and his position was so changed effective that date.

36. The position of light duty cleaner in the building was and is a substantially less desirable position than the position of night starter.

37. Upon information and belief, the night starter position in the building formerly held by the plaintiff Phillips was given by the defendants PBC and Temco to an employee of Spartan who is much younger than the plaintiff Phillips and who has much less seniority in the building than the plaintiff Phillips.

Plaintiffs Filed Age Discrimination Grievances Under the Local 32B-J CBA.

38. In or about August 2003, the plaintiffs filed grievances against the defendants under the Local 32B-J Collective Bargaining Agreement with the defendants (the "CBA") alleging, among other things, that by removing them from their positions at the building and reassigning them to other, less desirable positions as set forth above, the defendants PBC and Temco violated the provision of the CBA which prohibited discrimination against them because of their age.

39. That Local 32B-J initially submitted the plaintiffs' aforesaid age discrimination grievances against the defendants under the CBA to arbitration, along with other grievances against the defendants for other violations of the CBA.

40. That by letter dated February 23, 2004, Local 32B-J withdrew from arbitration the plaintiffs' aforesaid grievances that the defendants violated the CBA by discriminating against them because of their age.

41. That on or about August 21, 2004, the plaintiffs filed in this Court, under Index Number

04 CV 6769 (NRB), an action against Local 32B-J and the defendants PBC, 14 Penn Plaza LLC and Temco, alleging that Local 32B-J breached its duty of fair representation toward them by withdrawing from arbitration, among other grievances filed by the plaintiffs against the defendants under the CBA, their aforesaid age discrimination grievance. A copy of the complaint in said action is annexed hereto as Exhibit "A".

Plaintiffs' EEOC Filings and Receipt of Right to Sue Letters.

42. On or about May 18, 2004, the plaintiffs jointly filed a complaint of age discrimination against the defendants with the United States Equal Employment Opportunity Commission New York District Office ("EEOC").

43. On or about May 26, 2004, at the request of the EEOC, the plaintiffs filed individual complaints of age discrimination against the defendants with the EEOC.

44. On or about August 25, 2004, the EEOC issued a right to sue letter to the plaintiff Pyett.

45. On or about June 25, 2004, and September 9, 2004, the EEOC issued right to sue letters to the plaintiff O'Connell.

46. On or about June 25, 2004, and September 9, 2004, the EEOC issued right to sue letters to the plaintiff Phillips. Copies of the aforesaid EEOC complaints filed by the plaintiffs,

and the right to sue letters issued to them by the EEOC, are annexed hereto as Exhibit "B".

AS AND FOR A FIRST CAUSE OF ACTION UNDER THE ADEA

47. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs numbered "1" through "46" hereof as though set forth fully at length herein.

48. By reason of their aforesaid acts, the defendants have discriminated against the plaintiff Pyett because of his age, in violation of 29 U.S.C. §623(a)(l).

49. That the plaintiff Pyett has been damaged by defendants' aforesaid discrimination against him by loss of income, humiliation and emotional distress.

50. By reason of their aforesaid acts, the defendants have discriminated against the plaintiff O'Connell because of his age, in violation of 29 U.S.C. §623(a)(l).

51. That the plaintiff O'Connell has been damaged by defendants' aforesaid discrimination against him, by loss of income, humiliation and emotional distress.

52. By reason of their aforesaid acts, the defendants have discriminated against the plaintiff Phillips because of his age, in violation of 29 U.S.C. §623(a)(l).

53. That the plaintiff Phillips has been damaged by defendants' aforesaid discrimination

against him, by loss of income, humiliation and emotional distress.

AS AND FOR A SECOND CAUSE OF ACTION UNDER SECTION 296.1 OF THE NEW YORK STATE EXECUTIVE LAW (HUMAN RIGHTS LAW)

54. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs numbered "1" through "53" hereof as though set forth fully at length herein.

55. By reason of their aforesaid acts, the defendants have discriminated against the plaintiff Pyett because of his age, in violation of Section 296.1 of the New York Executive Law (Human Rights Law).

56. That the plaintiff Pyett has been damaged by defendants' aforesaid discrimination against him, by loss of income, humiliation and emotional distress.

57. By reason of their aforesaid acts, the defendants have discriminated against the plaintiff O'Connell because of his age, in violation of Section 296.1 of the Human Rights Law.

58. That the plaintiff O'Connell has been damaged by defendants' aforesaid discrimination against him, by loss of income, humiliation and emotional distress.

59. By reason of their aforesaid acts, defendants discriminated against the plaintiff Phillips because of his age, in violation of Section 296.1 of the Human Rights Law.

60. That the plaintiff Phillips has been damaged by defendants' aforesaid discrimination against him, by loss of income, humiliation and emotional distress.

AS AND FOR A THIRD CAUSE OF ACTION UNDER TITLE 8, CHAPTER 8-107(1)(A) OF THE NEW YORK CITY ADMINISTRATIVE CODE

61. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs numbered "1" through "60" hereof as though set forth fully at length herein.

62. By reason of their aforesaid acts, the defendants have discriminated against the plaintiff Pyett because of his age, in violation of Title 8, Chapter 8-107(l)(a) of the New York City Administrative Code.

63. That the plaintiff Pyett has been damaged by defendants' aforesaid discrimination against him by loss of income, humiliation and emotional distress.

64. By reason of their aforesaid acts, the defendants have discriminated against the plaintiff O'Connell because of his age, in violation of Title 8, Chapter 8-107(l)(a) of the New York City Administrative Code.

65. That the plaintiff O'Connell has been damaged by defendants' aforesaid discrimination against him, by loss of income, humiliation and emotional distress.

66. By reason of their aforesaid acts, the defendants have discriminated against the plaintiff Phillips because of his age, in violation of Title 8, Chapter 8-107(l)(a) of the New York City Administrative Code.

67. That the plaintiff Phillips has been damaged by defendants' aforesaid discrimination against him, by loss of income, humiliation and emotional distress.

WHEREFORE, plaintiffs Steven Pyett, Thomas O'Connell, and Michael Phillips, demand judgment against the defendants Pennsylvania Building Company, 14 Penn Plaza LLC, and Temco Service Industries, Inc., jointly and severally, as follows:

a. On the First Cause of action:

(i) directing defendants to reinstate the plaintiff Pyett to his former position of employment at the building

(ii) for damages in favor of the plaintiff Steven Pyett for lost income and benefits from the date of his reassignment to the date of judgment, in an amount to be determined at the trial of this action;

(iii) for damages in favor of the plaintiff Steven Pyett for front pay from the date of judgment until said plaintiff reaches the age of 65, in an amount to be determined at the trial of this action;

(iv) for compensatory damages in favor of the plaintiff Steven Pyett in an amount to be determined at the trial of this action;

(v) for punitive damages in favor of the plaintiff Steven Pyett in an amount to be determined at the trial of this action;

(vi) for interest in favor of the plaintiff Steven Pyett on the aforesaid amounts;

(vii) for the plaintiff Steven Pyett's reasonable attorneys fees, in an amount to be determined at the trial of this action;

(viii) directing defendants to reinstate the plaintiff O'Connell to his former position of employment at the building;

(ix) for damages in favor of the plaintiff Thomas O'Connell for lost income and benefits from the date of his reassignment to the date of judgment, in an amount to be determined at the trial of this action;

(x) for damages in favor of the plaintiff Thomas O'Connell for front pay from the date of judgment until said plaintiff reaches the age of 65, in an amount to be determined at the trial of this action;

(xi) for compensatory damages in favor of the plaintiff Thomas O'Connell in an amount to be determined at the trial of this action;

(xii) for punitive damages in favor of the plaintiff Thomas O'Connell in an amount to be determined at the trial of this action;

(xiii) for interest in favor of the plaintiff Thomas O'Connell on the aforesaid amounts;

(xiv) for the plaintiff Thomas O'Connell's reasonable attorneys fees, in an amount to be determined at the trial of this action;

(xv) directing defendants to reinstate the plaintiff Phillips to his former position of employment at the building;

(xvi) for damages in favor of the plaintiff Michael Phillips for lost income and benefits from the date of his reassignment to the date of judgment, in an amount to be determined at the trial of this action;

(xvii) for damages in favor of the plaintiff Michael Phillips for front pay from the date of judgment until said plaintiff reaches the age of 65, in an amount to be determined at the trial of this action;

(xviii) for compensatory damages in favor of the plaintiff Michael Phillips in an amount to be determined at the trial of this action;

(xix) for punitive damages in favor of the plaintiff Michael Phillips in an amount to be determined at the trial of this action;

(xx) for interest in favor of the plaintiff Michael Phillips on the aforesaid amounts;

(xxi) for the plaintiff Michael Phillips' reasonable attorneys fees, in an amount to be determined at the trial of this action;

b. On the Second Cause of Action:

(i) directing defendants to reinstate the plaintiff Pyett to his former position of employment at the building;

(ii) for damages in favor of the plaintiff Steven Pyett for lost income and benefits from the date of his reassignment to the date of judgment, in an amount to be determined at the trial of this action;

(iii) for damages in favor of the plaintiff Steven Pyett for front pay from the date of judgment until said plaintiff reaches the age of 65, in an amount to be determined at the trial of this action;

(iv) for compensatory damages in favor of the plaintiff Steven Pyett in an amount to be determined at the trial of this action;

(v) for punitive damages in favor of the plaintiff Steven Pyett in an amount to be determined at the trial of this action;

(vi) for interest in favor of the plaintiff Steven Pyett on the aforesaid amounts;

(vii) for the plaintiff Steven Pyett's reasonable attorneys fees, in an amount to be determined at the trial of this action;

(viii) directing defendants to reinstate the plaintiff O'Connell to his former position of employment at the building;

(ix) for damages in favor of the plaintiff Thomas O'Connell for lost income and benefits from the date of his reassignment to the date of judgment, in an amount to be determined at the trial of this action;

(x) for damages in favor of the plaintiff Thomas O'Connell for front pay from the date of judgment until said plaintiff reaches the age of 65, in an amount to be determined at the trial of this action;

(xi) for compensatory damages in favor of the plaintiff Thomas O'Connell in an amount to be determined at the trial of this action;

(xii) for punitive damages in favor of the plaintiff Thomas O'Connell in an amount to be determined at the trial of this action;

(xiii) for interest in favor of the plaintiff Thomas O'Connell on the aforesaid amounts;

(xiv) for the plaintiff Thomas O'Connell's reasonable attorneys fees, in an amount to be determined at the trial of this action;

(xv) directing defendants to reinstate the plaintiff Michael Phillips to his former position of employment at the building;

(xvi) for damages in favor of the plaintiff Michael Phillips for lost income and benefits from the date of his reassignment to the date of judgment, in an amount to be determined at the trial of this action;

(xvii) for damages in favor of the plaintiff Michael Phillips for front pay from the date of judgment until said plaintiff reaches the age of 65, in an amount to be determined at the trial of this action;

(xviii) for compensatory damages in favor of the plaintiff Michael Phillips in an amount to be determined at the trial of this action;

(xix) for punitive damages in favor of the plaintiff Michael Phillips in an amount to be determined at the trial of this action;

(xx) for interest in favor of the plaintiff Michael Phillips on the aforesaid amounts;

(xxi) for the plaintiff Michael Phillips' reasonable attorneys fees, in an amount to be determined at the trial of this action.

c. On the Third Cause of Action:

(i) directing defendants to reinstate the plaintiff Pyett to his former position of employment at the building;

(ii) for damages in favor of the plaintiff Steven Pyett for lost income and benefits from the date of his reassignment to the date of judgment, in an amount to be determined at the trial of this action;

(iii) for damages in favor of the plaintiff Steven Pyett for front pay from the date of judgment until said plaintiff reaches the age of 65, in an amount to be determined at the trial of this action;

(iv) for compensatory damages in favor of the plaintiff Steven Pyett in an amount to be determined at the trial of this action;

(v) for punitive damages in favor of the plaintiff Steven Pyett in an amount to be determined at the trial of this action;

(vi) for interest in favor of the plaintiff Steven Pyett on the aforesaid amounts;

(vii) for the plaintiff Steven Pyett's reasonable attorneys fees, in an amount to be determined at the trial of this action;

(viii) directing defendants to reinstate the plaintiff O'Connell to his former position of employment at the building;

(ix) for damages in favor of the plaintiff Thomas O'Connell for lost income and benefits from the date of his reassignment to the date of judgment, in an amount to be determined at the trial of this action;

(x) for damages in favor of the plaintiff Thomas O'Connell for front pay from the date of judgment until said plaintiff reaches the age of 65, in an amount to be determined at the trial of this action;

(xi) for compensatory damages in favor of the plaintiff Thomas O'Connell in an amount to be determined at the trial of this action;

(xii) for punitive damages in favor of the plaintiff Thomas O'Connell in an amount to be determined at the trial of this action;

(xiii) for interest in favor of the plaintiff Thomas O'Connell on the aforesaid amounts;

(xiv) for the plaintiff Thomas O'Connell's reasonable attorneys fees, in an amount to be determined at the trial of this action;

(xv) directing defendants to reinstate the plaintiff Michael Phillips to his former position of employment at the building.

(xvi) for damages in favor of the plaintiff Michael Phillips for lost income and benefits from the date of his reassignment to the date of judgment, in an amount to be determined at the trial of this action;

(xvii) for damages in favor of the plaintiff Michael Phillips for front pay from the date of judgment until said plaintiff reaches the age of 65, in an amount to be determined at the trial of this action;

(xviii) for compensatory damages in favor of the plaintiff Michael Phillips in an amount to be determined at the trial of this action;

(xix) for punitive damages in favor of the plaintiff Michael Phillips in an amount to be determined at the trial of this action;

(xx) for interest in favor of the plaintiff Michael Phillips on the aforesaid amounts;

(xxi) for the plaintiff Michael Phillips' reasonable attorneys fees, in an amount to be determined at the trial of this action.

Dated: New York, NY
November 4, 2004

KREISBERG MAITLAND &
THORNHILL, LLP

SIGNATURE OMITTED

By: ______________________________
Jeffrey L. Kreisberg (JK-2599)
14 Penn Plaza
New York, New York 10122
(212) 629-4970
Attorneys for Plaintiffs

CAPTION OMITTED

COMPLAINT

Plaintiffs, STEVEN PYETT, THOMAS O'CONNELL, and MICHAEL PHILLIPS, by their attorneys, Kreisberg Maitland & Thornhill, LLP, as and for their complaint herein, respectfully allege and show to this Court the following:

NATURE OF ACTION

1. This is a civil action arising under 29 U.S.C. §185, in which the plaintiffs allege that the defendant, LOCAL 32B-32J SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO ("Local 32B-J"), breached its duty of fair representation toward them, by withdrawing from arbitration their grievances that they were wrongfully removed from their former positions of employment in the building known as 14 Penn Plaza, New York, New York (the "building"), and reassigned to other, less desirable, positions in the building, in violation of the collective bargaining agreement by which they were covered.

JURISDICTION

2. This Court has jurisdiction herein under 29 U.S.C § 185 (a) and 28 U.S.C. §1331.

VENUE

3. Venue is proper in this Court under 29 U.S.C. § 185 (c) and 28 U.S.C. § 1391 (b).

PARTIES

4. The plaintiff, STEVEN PYETT ("Pyett"), is and was at all times relevant hereto, a citizen residing in the state of Pennsylvania, a member of the defendant Local 32B-J, and an employee in the building.

5. The plaintiff, THOMAS O'CONNELL ("O'Connell"), is and was at all times relevant hereto, a citizen residing in the state of Pennsylvania, a member of the defendant Local 32B-J, and an employee in the building.

6. The plaintiff, MICHAEL PHILLIPS, is and was at all times relevant hereto, a citizen residing in the state of New York, a member of the defendant Local 32B-J, and an employee of the building.

7. Upon information and belief, the defendant, PENNSYLVANIA BUILDING COMPANY ("PBC"), located at 14 Penn Plaza, New York, New York, is and was at all times relevant hereto, a New York corporation which itself, or through one or more of its affiliated or related companies, is the owner and operator of the building.

8. Upon information and belief, the defendant, 14 PENN PLAZA LLC ("14 PPLLC"), located at 14 Penn Plaza, New York, New York, is and was at all times relevant hereto, a New York limited liability company, an affiliated company of the defendant PBC and an alter-ego thereof.

9. Upon information and belief, the defendant, TEMCO SERVICE INDUSTRIES, INC, ("Temco"), located at 2 Park Avenue, New York, New York, is and was at all times relevant hereto a New York corporation which provides cleaning, maintenance, security and other services to the defendants PBC and/or 14 PPLLC at the building known as 14 Penn Plaza, New York, New York.

10. Upon information and belief, the defendant LOCAL 32B-32J, is and was at all times relevant hereto, a labor organization having its office located at 101 Avenue of the Americas, New York, New York, which represents for purposes of collective bargaining many thousands of building service employees employed at buildings throughout the City of New York, including the plaintiffs and certain other building service employees employed at the building known as 14 Penn Plaza, New York, New York.

FACTS

The Plaintiffs' Background and Employment History in the Building.

11. The plaintiff Pyett was born on October 18, 1952.

12. The plaintiff Pyett began working in the building in or about 1970, and has been continuously employed in the building from that date until the present.

13. The plaintiff Pyett has held various positions in the building, including elevator operator (1970-72), porter (1972-74), handyman

(1974-76), night porter (1976-82), day elevator starter (1982-83), freight elevator operator (1983-84), night starter (1984-89), night watchman (1989-2003), and night porter (2003-present).

14. The plaintiff O'Connell was born on June 19, 1942.

15. The plaintiff O'Connell began working in the building in or about 1969, was continuously employed in the building from that date until approximately 1982, returned to work in the building in approximately 1988, and was continuously employed in the building from that date until the date of his retirement, in or about July 2004.

16. The plaintiff O'Connell held various positions in the building, including security (1969-1977), night watchman (1977-1982), handyman (1988-89), freight operator (1989-1992), night watchman (1992-2003), and night porter (2003-04).

17. The plaintiff Phillips was born on February 28, 1948.

18. The plaintiff Phillips began working in the building in or about 1995, and has been continuously employed in the building from that date until the present.

19. The plaintiff Phillips has held the positions of night starter (1995-2003) and night porter (2003-present) in the building.

The Defendant Temco is Hired at the Building

20. Upon information and belief, in or about 1982, the defendant Temco began providing maintenance and cleaning services in the building. Upon further information and belief, at or about said time, the plaintiffs and the other building service employees in the building were transferred from the payroll of the defendant PBC to the payroll of the defendant Temco. Notwithstanding such payroll change, and continuing to the present, the plaintiffs have continued to receive their work assignments, and take direction in the performance of their duties, from supervisory employees of the defendant PBC.

Spartan Security is Hired at the Building.

21. Upon information and belief, in or about August 2003, Spartan Security was hired by the defendant PBC to provide security services at the building.

22. Upon information and belief, Spartan Security is a subsidiary, division, department, related or affiliated company of the defendant Temco.

The Collective Bargaining Agreement Covering The Plaintiffs.

23. Upon information and belief, at all times relevant hereto, the defendants PBC and Temco were, and they still are, party to a collective bargaining agreement with the defendant Local 32B-J, covering the terms and conditions of employment of all building maintenance and

service employees employed at the building, including the plaintiffs.

24. At all times relevant hereto, the plaintiffs were members in good standing of the defendant Local 32B-J, and covered by the terms of the aforesaid collective bargaining agreement between said defendant and the defendants PBC and Temco.

25. Upon information and belief, at the time they were hired to perform services at the building, in or about August 2003, and presently, Spartan Security was and is not party to any collective bargaining agreement with the defendant Local 32B-J, and the employees of Spartan Security in the building were and are not covered by the terms of any collective bargaining agreement between Spartan Security and the defendant Local 32B-J.

The Plaintiffs are Assigned to Less Favorable Positions in the Building, Replaced by Employees of Spartan and Subject to other Adverse Treatment

26. On or about August 11, 2003, the plaintiff Pyett was informed by the defendants PBC and Temco that his position was being changed from night watchman to night porter, the position he presently holds, and his position was so changed effective that date.

27. The position of night porter in the building was and is a substantially less desirable position than the position of night watchman.

28. The change in the position of the plaintiff Pyett from night watchman to night porter has resulted in a substantial loss of income for him.

29. Upon information and belief, the night watchman position in the building formerly held by the plaintiff Pyett was given by the defendants PBC and Temco to an employee of Spartan, who is much younger than the plaintiff Pyett, and who had much less seniority in the building than the plaintiff Pyett.

30. Upon information and belief, on a date presently unknown, but believed to be after August 11, 2003, a handyman position in the building became available.

31. That the plaintiff Pyett duly applied for said handyman position in the building and was fully qualified for said position.

32. That the plaintiff Pyett was not selected for said handyman position. Said position was instead given to an employee in the building who had much less seniority in the building than the plaintiff Pyett and who was much younger than him.

33. That the wages and overtime opportunities for the position of handyman were and are substantially greater than the wages and overtime opportunities for the position of night porter.

34. That as a result of not having been selected for the position of handyman in the

building, the plaintiff Pyett has suffered and continues to suffer substantial lost wages and overtime.

35. That following his removal from the position as night watchman in the building and his reassignment to the position of night porter effective August 11, 2003, as aforesaid, the defendants PBC and Temco changed the method in which overtime is assigned to employees in the building, so that beginning on or about said date, overtime was no longer assigned on a rotating basis among all the employees in the building, as required under the terms of the aforesaid collective bargaining agreement.

36. That the plaintiff Pyett has been and continues to be damaged by the aforesaid unequal assignment of overtime in the building.

37. On or about August 11, 2003, the plaintiff O'Connell was informed by the defendants PBC and Temco that his position was being changed from night watchman to night porter, the position he held from on and after that date until the date of his retirement, in or about July 2004, as aforesaid, and his position was so changed effective that date.

38. The change in the position of the plaintiff O'Connell from night watchman to night porter resulted in substantial loss of income for him.

39. Upon information and belief, the night watchman position in the building formerly held by the plaintiff O'Connell was given by the

defendants PBC and Temco to an employee of Spartan, who is much younger than the plaintiff O'Connell, and who had much less seniority in the building than the plaintiff O'Connell.

40. That the plaintiff O'Connell duly applied for the aforesaid handyman position which became available in the building following August 11, 2003, and was fully qualified for said position.

41. That the plaintiff O'Connell was not selected for said handyman position. Said position was instead given to an employee in the building who had much less seniority in the building than the plaintiff O'Connell and who was much younger than him.

42. That as a result of not having been selected for the position of handyman in the building, the plaintiff O'Connell suffered substantial lost wages and overtime from the date of his non-appointment to the date of his aforesaid retirement, in or about July 2004.

43. That following his removal from the position of night watchman in the building and his reassignment to the position of night porter effective August 11, 2003, as aforesaid, and until the date of his retirement, in or about July 2004, the plaintiff O'Connell was also damaged by the aforesaid unequal assignment of overtime in the building by the defendants PBC and Temco.

44. On or about August 11, 2003, the plaintiff Phillips was informed by the defendants PBC and Temco that his position was being changed from

night starter to night porter, the position he presently holds, and his position was so changed effective that date.

45. The position of night porter in the building was and is a substantially less desirable position than the position of night starter.

46. Upon information and belief, the night starter position in the building formerly held by the plaintiff Phillips was given by the defendants PBC and Temco to an employee of Spartan who is much younger than the plaintiff Phillips, and who has much less seniority in the building than the plaintiff Phillips.

47. That following his removal from the position of night starter in the building and his reassignment to the position of night porter effective August 11, 2003, as aforesaid, the plaintiff Phillips also has been and continues to be damaged by the aforesaid unequal assignment of overtime in the building by the defendants PBC and Temco.

The Plaintiffs File Grievances Under the Collective Bargaining Agreement.

48. Under the terms of the aforesaid collective bargaining agreement between the defendants PBC, Temco and Local 32B-J, by which plaintiffs were and are covered, alleged violations of said agreement, or disputes arising under said agreement, are required to be resolved through a grievance procedure, the final step of which is binding arbitration administered through the

office of the contract arbitrator designated in said agreement. Under the terms of the aforesaid collective bargaining agreement, any aggrieved employee covered by the agreement may file a grievance thereunder, but only the defendant Local 32B-J may submit such grievance to binding arbitration.

49. In or about August 2004, the plaintiff Pyett submitted a grievance or grievances to the defendant Local 32B-J, alleging that the defendants PBC and Temco violated the collective bargaining agreement, by changing his position in the building from night watchman to night porter, denying him the handyman position, depriving him of an equal opportunity to work overtime and discriminating against him because of his age.

50. In or about August 2004, the plaintiff O'Connell submitted a grievance or grievances to the defendant Local 32B-J, alleging that the defendants PBC and Temco violated the collective bargaining agreement, by changing his position in the building from night watchman to night porter, denying him the handyman position, depriving him of an equal opportunity to work overtime and discriminating against him because of his age.

51. In or about August 2004, the plaintiff Phillips submitted a grievance or grievances to the defendant Local 32B-J, alleging that the defendants PBC and Temco violated the collective bargaining agreement, by changing his position in the building from night starter to night porter,

depriving him of an equal opportunity to work overtime and discriminating against him because of his age.

52. The aforesaid grievances of the plaintiffs not having been resolved at the preliminary steps of the grievance procedure of the collective bargaining agreement, the defendant Local 32B-J duly submitted said grievances to binding arbitration under the agreement, and initially pursued each of the aforesaid claims set forth in said grievances in said arbitration.

53. On or about February 4, 2004, the initial arbitration hearing was held on the plaintiffs' aforesaid grievances before the duly designated Arbitrator, Earl J. Pfeiffer. At said arbitration hearing, the defendant Local 32B-J stated its intention to proceed to arbitration on each of the aforesaid claims set forth in the plaintiffs' aforesaid grievances.

The Union Withdraws From Arbitration the Plaintiffs' Change of Position and Age Discrimination Grievances.

54. By letter dated February 23, 2004, the defendant Local 32B-J, by its counsel, informed the aforesaid Arbitrator in the arbitration proceeding, that the defendant Local 32B-J was withdrawing from arbitration the plaintiffs' claims that their positions of employment and shifts were wrongfully changed and that they were discriminated against because of their age.

Plaintiffs File Age Discrimination Complaints with the EEOC.

55. On or about May 20, 2004, each of the plaintiffs duly filed complaints with the Equal Employment Opportunity Commission, alleging that by reason of the defendants' PBC, 14 PPLLC and Temco's aforesaid acts, they were discriminated against because of their age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 623.

56. On or about June 25, 2004, the EEOC issued right to sue letters to the plaintiffs O'Connell and Phillips. The complaint of the plaintiff Pyett remains under investigation by the EEOC.

CAUSE OF ACTION

57. Plaintiffs repeat and reallege each and every allegation set forth in Paragraphs numbered "1" through "56" of this Complaint as though set forth fully at length herein.

58. Article XIII, Section 1(f), of the collective bargaining agreement provides that the Employer shall follow and be bound by the rules of seniority of members in the bargaining unit regarding job security.

59. Article XIV, Section 11, of the collective bargaining agreement provides that in the event of layoff due to reduction of force, inverse order of department or job classification seniority shall be followed, except in circumstances not relevant herein. Said section further provides that

seniority of an employee shall be based upon total length of service with the Employer or in the building, whichever is greater.

60. Article XIV, Section 30, of the collective bargaining agreement provides, among other things, that there shall be no discrimination against any employee by reason of the employee's age.

61. By removing the plaintiffs Pyett and O'Connell from their positions of night watchman, and replacing them with employees of Spartan Security who had much less seniority and were much younger than them, defendants PBC and Temco clearly violated Article XIII, Section 1(f), and Article XIV, Sections 11 and 30, of the collective bargaining agreement.

62. By removing the plaintiff Phillips from his position of night starter, and replacing him with an employee of Spartan Security who had much less seniority and was much younger than him, defendants PBC and Temco clearly violated Article XIII, Section 1(f), and Article XIV, Sections 11 and 30, of the collective bargaining agreement.

63. Upon information and belief, the action of the defendant Local 32B-J of withdrawing from arbitration the plaintiffs' aforesaid grievances that they were wrongfully removed from their positions in the building and reassigned to less desirable positions, in violation of the collective bargaining agreement, was based upon an agreement, or understanding entered into or otherwise reached

or made between the defendants PBC, Temco and Local 32B-J, to permit non-Local 32B-J represented employees to work in the building, i.e., employees of Spartan Security, thereby resulting in or achieving cost savings to the defendants PBC or Temco, by said defendants not being required to pay wages and benefits to such Spartan employees in the same amounts that would be required to be paid to plaintiffs under the collective bargaining agreement, had plaintiffs continued in their previously held positions and not been removed and from said positions and reassigned to less desirable positions, as aforesaid.

64. By reason of the foregoing, the action of the defendant Local 32B-J of withdrawing from arbitration the plaintiffs' grievances that they were wrongfully removed from their positions in the building and reassigned to less desirable positions and discriminated against because of their age, in violation of the collective bargaining agreement, was arbitrary, discriminatory and in bad faith.

65. The defendant Local 32B-J's aforesaid action of withdrawing from arbitration plaintiffs' aforesaid meritorious claims, based upon an improper agreement or aforesaid, seriously undermined the arbitral process.

66. Plaintiff Pyett has been damaged by the defendant Local 32B-J's aforesaid breach of its duty of fair representation toward him, by the loss

of his position of night watchman and his reassignment to the position of night porter, in an amount presently unknown to him, to be determined at trial, but believed to be at least $250,000.

67. Plaintiff O'Connell has been damaged by the defendant Local 32B-J's aforesaid breach of its duty of fair representation toward him, by the loss of his position of night watchman and his reassignment to the position of night porter, in an amount presently unknown to him, to be determined at trial, but believed to be at least $250,000.

68. Plaintiff Phillips has been damaged by the defendant Local 32B-J's aforesaid breach of its duty of fair representation toward him, by the loss of his position of night starter and his reassignment to the position of night porter,: in an amount presently unknown to him, to be determined at trial, but believed to be at least $250,000.

WHEREFORE, the plaintiffs, STEVEN PYETT, THOMAS O'CONNELL, and MICHAEL PHILLIPS, pray for the entry of an order and judgment in their favor and against the defendants, LOCAL 32 B-32J SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, PENNSYLVANIA BUILDING COMPANY, 14 PENN PLAZA LLC, and TEMCO SERVICE INDUSTRIES, INC., jointly and severally, as follows:

(a) directing. them to forthwith reinstate the plaintiff, STEVEN PYETT, to his position of night watchman;

(b) directing them to forthwith reinstate the plaintiff, MICHAEL PHILLIPS, to his position of night starter;

(c) awarding the plaintiff, STEVEN PYETT, compensatory damages in an amount to be determined at the trial of this action, but at least $250,000;

(d) awarding the plaintiff, THOMAS O'CONNELL, compensatory damages in an amount to be determined at the trial of this action, but at least $250,000;

(e) awarding the plaintiff, MICHAEL PHILLIPS, compensatory damages in an amount to be determined at the trial of this action, but at least $250,000;

(f) awarding them punitive damages in an amount to be determined at the trial of this action, but at least $100,000 each;

(g) awarding them prejudgment interest on the aforesaid amounts from February 23, 2004;

(h) awarding them their reasonable attorneys fees of this action;

(i) awarding them their costs and disbursements of this action; and

(j) granting them such other, different, and further relief as to this Court seems just and proper.

Dated: New York, NY
August 20, 2004

KREISBERG MAITLAND &
THORNHILL, LLP

SIGNATURE OMITTED

By: ______________________________
Jeffrey L. Kreisberg (JK-2599)
14 Penn Plaza
New York, New York 10122
(212) 629-4970
Attorneys for Plaintiffs

CAPTION OMITTED

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the Notice of Motion of Defendants Pennsylvania Building Company and 14 Penn Plaza LLC dated November 23, 2005 and all the supporting papers submitted therewith, and upon all the prior pleadings and proceedings had heretofore herein, the undersigned will move this Court at the United States Courthouse located at 500 Pearl Street, New York, New York, at such time as may be directed by the Court, for an Order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure granting Defendant Temco Service Industries, Inc. judgment dismissing Plaintiffs' complaint in its entirety or, in the alternative, remanding Plaintiffs' age claims to the arbitrator and directing Plaintiff to arbitrate their age claims pursuant to the Federal Arbitration Act (9 U.S.C. §§ 3 and 4); for sanctions pursuant to 28 U.S.C. § 1927 and the inherent power of the Court; for costs; and for such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that Plaintiffs' answering papers, if any, shall be served and filed on or before January 6, 2006, and Defendant's reply thereto, if any, shall be served and filed on or before January 20, 2006.

Dated: New York, NY
November 23, 2005

Yours, etc.

LAW OFFICES OF HARRY WEINBERG

SIGNATURE OMITTED

By: ______________________________
Harry Weinberg (HW-0574)
11 Beach Street, 8th Floor
New York, New York 10013
(212) 989-2908
Attorney for Defendant Temco
Service Industries, Inc.

CAPTION OMITTED

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the Memorandum in Support of Defendants' Motion To Dismiss or Compel Arbitration And for Sanctions; the Declaration of Brian S. Rauch, Esq., and the exhibits attached thereto; the Affidavits of Charles Borrok and Larry Engelstein, Esq.; and all prior pleadings and proceedings had herein, Defendants Pennsylvania Building Company and 14 Penn Plaza LLC (collectively "Defendants") will move this Court, before the Honorable Naomi Reice Buchwald, at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York, 10017, on a date and time to be designated by the Court, for an Order and Judgment pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the complaint in its entirety or, in the alternative, remanding Plaintiffs' age claims to the arbitrator and directing Plaintiffs' to arbitrate their age claims pursuant to the Federal Arbitration Act (9 U.S.C. §§ 3 and 4); for sanctions pursuant to 28 U.S.C. § 1927 and the inherent power of the Court; for costs; and for such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that Plaintiffs' answering papers, if any, shall be served and filed on or before January 6, 2006, and Defendants' reply thereto, if any, shall be served and filed on or before January 20, 2006.

Dated: New York, NY
November 23, 2005

PROSKAUER ROSE LLP

By: /s/ Brian S. Rauch
Paul Salvatore (PS-1880)
Brian S. Rauch (BR-5784)
Attorneys for Defendants
Pennsylvania Building Co.
and
14 Penn Plaza LLC
1585 Broadway
New York, New York 10036-8299
(212) 969-3000

CAPTION OMITTED

DECLARATION OF BRIAN S. RAUCH

I, BRIAN S. RAUCH, ESQ., declare under the penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am associated with the law firm of Proskauer Rose LLP, attorneys for Defendants Pennsylvania Building Company and 14 Penn Plaza LLC (collectively the "Company") in this action. I submit this Declaration in support of the Memorandum in Support of Defendants' Motion To Dismiss or Compel Arbitration and for Sanctions. The matters set forth below are based on my personal knowledge and a review of documents and records in the possession of my firm.

2. At the April 11, 2005 initial court conference for the instant matter and the related hybrid Labor Management Relations Act ¶ 301/breach of contract lawsuit, the parties informed the Court of the arbitration that the Union was pursuing against Temco.

3. The Court directed that the litigations be stayed pending a decision in the arbitration in anticipation that the arbitrator's decision may eliminate the need to litigate either case.

4. On October 11, 2005, the parties' counsel attended a court conference regarding the instant lawsuit before this Court.

5. At the conference, the Court inquired about Plaintiffs' "evidence of age discrimination."

6. Plaintiffs' counsel stated that it is Plaintiffs' allegation that they were transferred due to a financial considerations.

7. Continuing, Plaintiffs' counsel stated that Plaintiffs allege it was age discrimination for Defendants to contract with Spartan and transfer Plaintiffs since this was a result of Defendants' desire to replace Plaintiffs' high salaries with the lower cost of Spartan security guards.

8. Further, Plaintiffs' counsel erroneously informed the Court that Second Circuit precedent holds the removal of older employees in favor of younger employees for financial reasons violates the ADEA.

9. The Court expressed its astonishment at Plaintiffs' theory and expressed its view that such a subcontracting decision could not be the basis of an age discrimination lawsuit, as well as questioning the wisdom of Plaintiffs continuing with this action.

10. The Court also questioned the wisdom of Plaintiffs continuing with this action, particularly given their espoused "theory" of the case.

11. Further, the Court noted that Plaintiffs have already waived any action against the Union by dismissing their hybrid §301 / breach of contract action.

12. Paul Salvatore, a member of Proskauer Rose LLP, and I have made repeated requests upon Plaintiffs' counsel to dismiss Plaintiffs' age discrimination claims before the Court and/or return to Arbitrator Pfeffer to arbitrate the claims.

13. Attached hereto as Exhibit 1 is a true and accurate copy of the Complaint in this matter, dated September 22, 2004.

14. Attached hereto as Exhibit 2 is a true and accurate copy of the 2005 Contractors Collective Bargaining Agreement between the Service Employees International Union, Local 32BJ, and the Real Estate Board on Labor Relations, Inc., effective October 1, 2004 to December 31, 2007.

15. Attached hereto as Exhibit 3 is a true and accurate copy of the Arbitration decision issued by Arbitrator Earl R. Pfeffer on August 10, 2005.

16. Attached hereto as Exhibit 4 is a true and accurate copy of Arbitrator Earl R. Pfeffer's Curriculum Vitae.

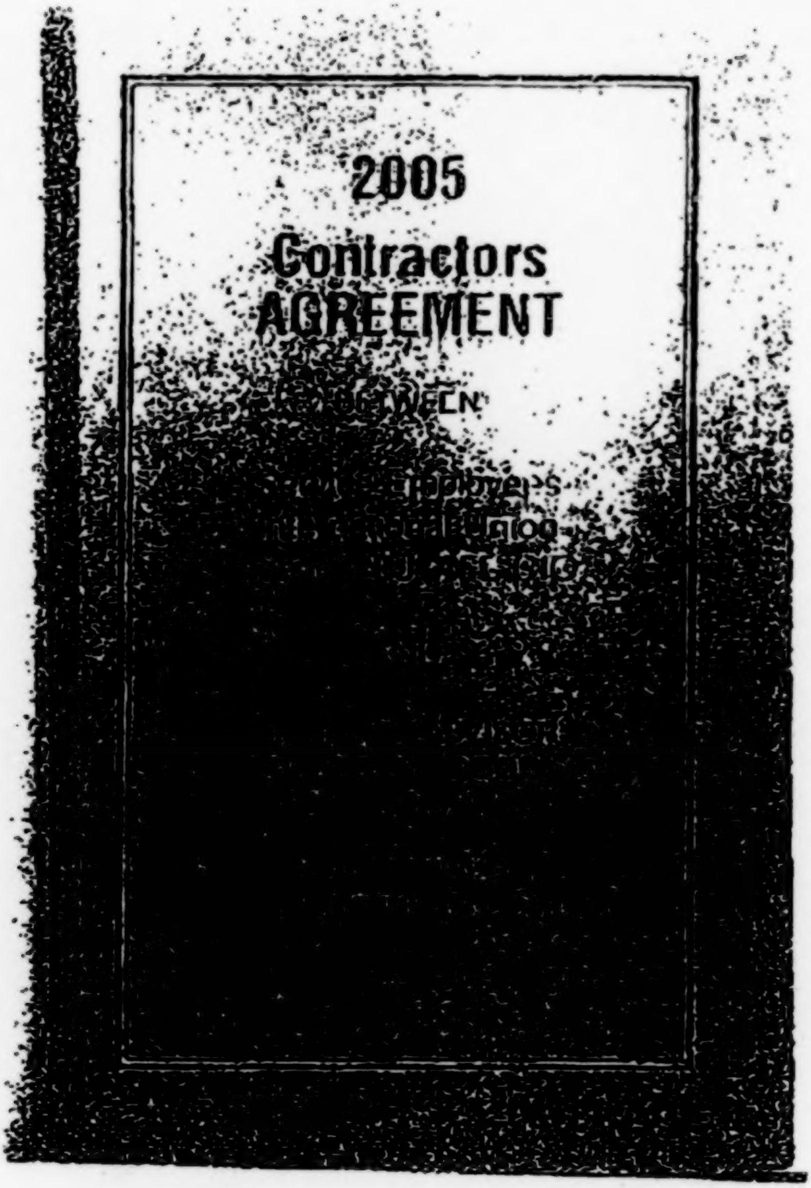
17. Attached hereto as Exhibit 3 is a true and accurate copy of the Stipulation of Dismissal, with Prejudice of Plaintiffs' hybrid Labor Management Relations Act § 301 / breach of contract action.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 23, 2005

SIGNATURE OMITTED

Brian S. Rauch, Esq.



2005

Contractors
AGREEMENT

BETWEEN

[illegible] Employers
[illegible] Union
[illegible]

Best Available Copy

ARTICLE I

Mutual Obligations

1. The Employer obligates itself that it will in good faith comply with all of the provisions of this Agreement. The Union obligates itself and its members that they will in good faith comply with all of the provisions of this Agreement and that the workers will perform their work conscientiously, faithfully and efficiently under the terms of this Agreement.

CAPTION OMITTED

APPEARANCES:

For the Union:	Raab Sturm & Goldman, LLP By: Ron Goldman, Esq.
For the Employer:	Rick Amarosa, Esq. John Fullerton III, Esq. Michael Vecchio Bedema Kolenovic Peter Chase Cordell Harrow
For the Realty Advisory Board:	Harry Weinberg, Esq.
Employee:	Jeffrey Kriesberg, Esq. Gary Maitland, Esq. Steven Pyett Thomas O'Connell Michael Phillips
	Ann Brunetti, Court Reporter Michelle Nardone, Court Reporter
Premises:	225 West 34th Street

INTRODUCTION

A dispute having arisen between TEMCO SERVICE INDUSTRIES and the Realty Advisory Board on Labor Relations, Inc. (hereinafter referred to as the "Company"), and Local 32BJ, Service Employees International Union (hereinafter referred to as the "Union"), concerning property at 225 West 34th Street, the same was submitted to the Undersigned for arbitration and Award pursuant to the pertinent provisions of the then current Collective Bargaining Agreement between the parties at hearings scheduled for February 2, March 18, April 23, July 28, October 20, and December 16, 2004 and March 4 and March 7, 2005.[1]

In letters to the Office of the Contract Arbitrator dated September 16 and October 30, 2003, the Union alleged the following complaints on behalf of Steven Pyett, Michael Phillips and Thomas O'Connell, and the same were by mutual consent of the parties submitted to the Undersigned for adjudication and Award.

> September 16, 2003
>
> The afore-mentioned members, employed at the above building as a security officer/porter, starter and a security officer/porter for thirty-four years and seven months, eight years and thirty-four years, respectively, claim that on August 11, 2003, their duties and shifts were changed due to a non-union security (Spartan) coming into the building. Also, Mr. Pyett and Mr. O'Connell's salaries are being reduced because they are losing premium pay.

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[1] Testimony was taken on march 18, 2004, July 28, 2004, March 4, 2005 and March 7, 2005. All but the July 28, 2004 hearing were transcribed.

In addition, Mr. Pyett is being denied weekend overtime in spite of his seniority, and he applied for a handyman's position and was interviewed on July 23, 2003 by Cordell Harrow who told him the position was on hold. The position was subsequently given to a less senior employee. Furthermore, Mr. O'Connell was given the hardest position in the building even though he's the second senior employee in the building.

He feels the company is discriminating against him because of his age and seniority.

We are claiming right to return to their original positions with the same days off and hours, and payment of any and all lost wages on behalf of Mr. Pyett and Mr. O'Connell due to the loss premium pay.

October 30, 2003

The above reference case had a Step II Grievance Hearing. The case is being submitted to your office for adjudication because the parties were not able to resolve the issue. A copy of the Union's original request for a Step II hearing is attached.

Also at this time we would like to amend this complaint that Mr. Pyett and Mr. Phillips are being discriminated against because of their age.

DISCUSSION AND FINDINGS

In this grievance, the Union protests the Company's alleged failure to honor the seniority of Steven Pyett and Thomas O'Connell when it filled an open handyman position in August 2003 with a less senior employee. In addition, the Union alleges the Company failed equitably to rotate overtime to Pyett and O'Connell, as well as to another employee, Michael Phillips. With respect to the seniority claim, the Unions asks Pyett or, alternatively, O'Connell, be awarded the handyman position and be made whole for lost wages at the handyman rate, including lost overtime, on account of the Company's breach.[2] The Union further asks the Company be ordered properly and equitably to rotate overtime. The Union requests a damages hearing to determine exact amounts due the grievants on account of the Company's alleged contract violations.[3]

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[2] The Union argues if Pyett is deemed to have been unqualified for the position - a finding the Union claims is implausible - then O'Connell as the next most senior qualified employee should have been awarded the position.

[3] The Union contends its overtime grievance should be read to include a claim for what it calls "free overtime" allegedly due the grievants, in particular Phillips, under Article XIV, Section 6 of the Agreement. Article XIV, Section 6, provides for "extra" pay at straight time rate if an employee performs all or part of an absent employee's specific assignment. The Company argues payments due under Article XIV, Section 6 are not overtime, but rather constitute straight time compensation, and fairly may not be deemed to be included in the Union's claim for overtime pay. The Company argues there is no reasonable reading of the

The Issues

The parties presented the following issues for arbitral determination:

1. Did the Company improperly fail to give the open handyman position to Pyett, or alternatively to O'Connell?
2. If so, what shall be the remedy?
3. Did the Company fail properly to rotate overtime in accordance with the collective bargaining agreement?
4. If so, what shall be the remedy?

The Union's Seniority Claim

The facts relevant to the Union's seniority claim are substantially undisputed. On or about August 11, 2003, Temco placed Michael Vecchio in an open handyman position. The open handyman position included assigned duties on the Building's No. 6 Boiler and on its fire protection system which could only be performed by an employee possessing special licenses issued by the New York City Fire Department. At the time the disputed position was filled, Vecchio possessed those licenses - a New York City No. 6 Boiler Operator License and a Standpipe/Sprinkler License. Pyett and

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grievance under which the Union fairly may be deemed to have asserted a claim for AB Time. My careful review of the Union's claim persuades me the Company's alleged breach of Article XIV, Section 6, is not encompassed by the Union's grievance, and therefore is not before me in this case.

O'Connell did not. Cordell Harrow, the Company's Area Supervisor who participated in the decision how to fill the vacancy, testified the determination to award the position to Vecchio over Pyett and O'Connell was based simply on the fact Vecchio possessed the required licenses, while the grievants did not.

The Union contends, essentially, the Company's grounds for awarding the position to Vecchio are pretextual. Pyett and O'Connell, the Union argues, not only have, more seniority than Vecchio, but they each also are more qualified for the job than he. Indeed, the Union points out, both Pyett and O'Connell previously held a handyman position at the building, and are fully capable of performing all the functions of the job. In fact, the Union notes, both Pyett and O'Connell satisfactorily performed work on the Building's boiler for a number of years prior to 2003. The latter fact is reflected in the Company-generated description of Pyett's job which lists numerous tasks related to boiler operation and maintenance. The Union further observes none of the Building's other handymen possess either the No. 6 Boiler License or the Standpipe/Sprinkler License.

Moreover, the Union argues, both Pyett and O'Connell would have possessed the required licenses but for the Company's obstruction of their efforts to qualify themselves to perform the work required by the disputed handyman position. Both Pyett and O'Connell testified, without refutation by the Company, they each had made multiple requests to the Building's Superintendent, Fred Farrugia, for a letter of recommendation for the No. 6 Boiler License. The Fire Department requires such letters before it will issue a license, or apparently even process an application to obtain one. Following each such request, Farrugia's response to both men was they did not need a license.[4]

In short, the Union argues, the Company's contention it denied Pyett and O'Connell the open handyman position "is nothing more than a thinly veiled attempt to evade the obligations of the parties' collective bargaining agreement." Union Brief at 3-4. Pyett and O'Connell, according to the Union, are in fact "more qualified for the job than Vecchio, seniority aside." Union Brief at 2. The Union maintains the Company cannot be permitted to hide behind its own improper refusal to permit Pyett and O'Connell to obtain required licenses as a basis for denying them the handyman position. The Union argues Pyett should be placed in the handyman position and should receive the difference between his pay and the handyman wage for the period August 11, 2003, through the present.[5]

The Company, on the other hand, asserts it did not violate the Agreement when it awarded the open handyman position to Vecchio. The Company, although acknowledging Vecchio had less seniority than either Pyett or O'Connell, nevertheless maintains it properly selected Vecchio for the handyman position for the simple reason Vecchio was qualified to fill the position, and Pyett and O'Connell were not. The Company asserts the grievants simply did not possess the

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[4] Farrugia did not testify at the arbitration hearing.

[5] O'Connell is now retired and if successful in his claim, would be eligible for hack pay only.

No. 6 Boiler License and the Standpipe/Sprinkler License which are required for the performance of the job's duties.

The Company further asserts it had "absolutely no obligation" to make Pyett or O'Connell qualified prospectively for the position, and it disputes the Union's contention it somehow rebuffed the grievants' efforts to obtain the necessary certifications. Indeed, the Company contends the grievants' claim s they made good faith requests to Farrugia for the letters of recommendation is an insufficient basis for awarding them the position. According to the Company, the grievants' alleged overtures to Farrugia were remote in time and, in any case, were inadequate. The Company points out both Pyett and O'Connell knew the proper person from whom to obtain recommendation letters was Fran Reynolds, the Building Manager, who had never previously refused requests by both Pyett and O'Connell for reference letters.

According to the Company, moreover, it matters not the special licenses are not possessed by other handymen employed in the Building. The Company argues there is no record evidence any handymen other than Vecchio have responsibility for the Building's boiler or its fire safety system.

In sum, the Company asserts its decision to place Vecchio in the open handyman position on August 11, 2003, was a proper exercise of its authority and did not violate the grievants' seniority or any provision of the Agreement.

The Union's Overtime Claim

The Union also claims the Company violated the Agreement by failing properly to rotate "traditional overtime" to Pyett, O'Connell and Phillips. The basis for the Union's claim is the unequal distribution of overtime to Company employees in the building from September 2003 through February 2004. The Union asserts during the five (5) month period in question, Phillips worked overtime once, for a total of two and one-half (2.5) hours; O'Connell worked overtime once for a total of eight (8) hours; and Pyett worked overtime three (3) times for a total of ten (10) hours. The Union argues the dearth of overtime opportunities for the grievants is, on its face, evidence of inequitable treatment. Indeed, the Union points out the five (5) month total for all three (3) grievants of twenty and one-half (20.5) hours of overtime is less than the overtime worked by Oscar Villegas during the week of December 14, 2003, alone.

Thus, the Union argues, the Company plainly has not properly rotated overtime and must be ordered forthwith to do so. Further, the Union asks for a hearing to determine the damages for the Company's breach.

The Company, in response, argues it rotated overtime fairly during the subject period. The Company insists its proper allocation of overtime to employees is reflected in the overtime records.

The Company asserts I must credit the testimony of Bedema Kolenovic, the Supervisor who assigns overtime to both the day and night staff. According to Kolenovic, the Company argues, most overtime ends up being assigned to employees on the day staff, because work requiring additional hours ordinarily occurs at night. The Company maintains the members of the night staff have their regular duties at night and therefore, obviously, would not be assigned overtime.

According to the Company, moreover, the payroll records demonstrate the absence of an overtime violation. The Company notes during the five (5) month period in question, Pyett received five (5) overtime assignments, and O'Connell and Phillips each received three (3). Thus, the Company argues, Pyett had the second highest number of overtime opportunities of all employees during the subject period, being eclipsed only by Hector Hernandez, a day shift employee who had six (6) opportunities. Further, the Company points out, except for Hernandez, Pyett and Victor Centeno, who like Pyett had five (5) opportunities, O'Connell and Phillips outpaced their co-workers in the number of overtime assignments. The Company further notes both Pyett and O'Connell admitted to having refused overtime opportunities when they did not like the assignment or simply did not want the work.

The Company, in short, argues there is no evidentiary basis for a finding it violated the grievants' rights to overtime opportunities, and the grievance must be denied.

Opinion

Seniority Claim

Employees' building seniority is among the rights most guarded by the parties' collective bargaining agreement. Under many circumstances outlined in the contract, employees with greater building seniority are ensured favored treatment. That favored treatment is not always absolute, however. Thus, in filling vacancies, signatory employers have reserved the right under Article XVII, Section 18, to consider additional enumerated factors; training, ability, efficiency, appearance and personality for a particular job. An employer's good faith consideration of those bona fide factors in filling a position with a less senior employee may, thus, be appropriate.

However, as the Union argues, I nevertheless have the authority to scrutinize the specific grounds proffered by the Company for bypassing the grievants' seniority. Indeed, while an employer's consideration under Article XVII, Section 10, of additional, enumerated factors is an appropriate exercise of its contractual rights, its decision-making in filling vacancies is not unreviewable.

With these principles in mind, I turn to the facts of this case. Based on my careful consideration of the arbitration record, I find the Company did not violate the agreement when it selected Vecchio, rather than Pyett or O'Connell, to fill the open handyman position on August 11, 2003. Unrebutted, credible testimony from Company witnesses demonstrates the duties of the handyman position at issue required the possession of two (2) licenses issued by the Fire Department. Vecchio had those licenses as of August 11, 2003, while Pyett and O'Connell plainly did not. Plainly, if neither Pyett nor O'Connell had the City licenses necessary to perform the duties of the open handyman position a fact not in dispute then the Company properly could fill the position with a less senior employee who did possess the required certifications.

I have considered the Union's argument the Company's reliance on licensing as a basis for bypassing seniority is inappropriate, given the unrefuted record evidence the Building's Superintendent may have discouraged the grievants' numerous attempts to obtain a No. 6 Boiler License. I agree that if the possession of licenses might be a basis for discounting employee seniority in filling a position, an employer must be neutral in its exercise of any role it might play in employees' acquisitions of those licenses.

I find no evidence, however, following my review of the instant record, the Company breached that neutrality. There is no record evidence Pyett or O'Connell ever even sought to obtain the Standpipe/Sprinkler License, and therefore, even if they had obtained the No. 6 Boiler License, they could not have established they possessed the credentials needed to perform the duties of the vacant handyman position. Thus, whether or not Farrugia's actions actually obstructed Pyett's and O'Connell's efforts to obtain the No. 6 Boiler License, I find no evidence the Company did anything to impede their ability to obtain the Sprinkler/Standpipe License, the other certification necessary for the position ultimately awarded to Vecchio.

Moreover, neither grievant ever went to Reynolds for help in obtaining the No. 6 Boiler License, although they concede she had always provided support and cooperation when they requested letters of recommendation required by the Fire Department for other licenses. Pyett's claim he did not go to Reynolds because "she wasn't on the premises when I worked," Transcript at 68, is not borne out by record facts, which demonstrate, to the contrary, Reynolds actually gave both Pyett and O'Connell at least two (2) recommendations each even after they contend they were rebuffed by Farrugia. Company Exhibit 1. Thus, I will not infer that Farrugia's apparent act of discouragement with respect to the No. 6 Boiler License impaired the grievants' abilities subsequently to seek and/or obtain that License through customary channels.[6]

Accordingly, I find the Company did not improperly fail to give the open handyman position to Pyett or O'Connell.

Overtime Claim

I have carefully reviewed the Union's claim the Company during the grievance period did not equitably distribute overtime. I have considered record evidence the overtime hours actually worked by employees varies substantially from employee to employee. I also have considered Pyett's and O'Connell's contention they were told they had been singled out by the Building's owner to be excluded from overtime opportunities. I find, however, the credible record evidence does not demonstrate the Company's rotation of overtime violated the Agreement.

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[6] I further note record evidence the grievants did not grieve the Company' purported obstruction of their efforts to obtain letters of reference required by the Fire Department.

The Union contends the Company's overtime records, on their face, demonstrate an unequal distribution. The Union notes the striking disparity in overtime worked by the various building employees. It points out O'Connell during the grievance period worked only one (1) overtime shift; Phillips worked two (2). The Union contends the disparity between the overtime actually worked by the grievants and the overtime opportunities afforded to several other employees, establishes a violation.

The Union also argues there was an explicit directive by the Building's owner, Mr. Barak, against offering overtime to Pyett, O'Connell or Phillips. The grievants allege Kolenovic intentionally denied them overtime opportunities at Barak's instruction, although none has identified a specific instance in which they were skipped over improperly by Kolenovic.

As to the Union's contention the Company's overtime records on their face show a failure to distribute equitably the overtime opportunities, I find the evidence falls short of establishing the necessary proofs I credit Harrow's and Kolenovic's testimony most overtime is worked by day shift employees, since most overtime opportunities occur at night when the grievants were working their regular shifts. Transcript at 134-5, 148. So, too, I credit Kolenovic's contention Pyett and O'Connell had turned down offered overtime.[7] In fact, Pyett admits he has rejected overtime work which involves tasks, like cleaning toilets, he deems to be degrading. Transcript at 122.

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[7] Kolenovic acknowledges Phillips did not turn down offered overtime Transcript at 166-7.

O'Connell, however, adamantly denies he ever turned down overtime. Transcript at 96, 172. His testimony conflicts with Kolenovic's recollection he expressly indicated he did not want the additional work. Transcript at 152, 154-6, 157-8, 160. Thereafter, according to Kolenovic, she did not offer him any. Transcript at 160.

My decision against crediting O'Connell's contrary claims is drawn from gross inconsistencies in his hearing testimony concerning his efforts to obtain a No. 6 Boiler License. His conflicting accounts, on an issue central to his seniority claim -- the frequency of his requests for a letter of reference undermines his overall credibility and taints the reliability of his recollections concerning other matters. Indeed, O'Connell, during his direct testimony in the seniority case, asserted he had spoken to Farrugia two (2) or three (3) times in 2002 concerning his interest in obtaining the No 6 Boiler License. However, during the rebuttal phase of the case, O'Connell testified he asked Farrugia about the No. 6 Boiler License "about 10" times over a four (4) year period. Whatever the reason for O'Connell's conflicting assertions, his shifting recollections, under oath, concerning his efforts to obtain the No. 6 Boiler License persuade me his testimony is unreliable with respect to other matters, as well.

Likewise, Pyett gave inconsistent testimony concerning the frequency of his discussions with Farrugia about the No. 6 Boiler License. On direct, Pyett testified he recalled the only time he asked Farrugia about obtaining the No. 6 Boiler License was four (4) to five (5) years prior to 2003. When he was specifically asked about the frequency of his inquiries, Pyett testified he did not recall asking Farrugia more than once. Subsequently, however, when Pyett gave rebuttal testimony, he testified he asked Farrugia about the No. 6 Boiler License, "(p)robably five times or more." Transcript at 66. Based upon the gross inconsistency in Pyett's testimony on a disputed matter of substantial importance in this proceeding, I conclude his hearing testimony on other equally important issues is similarly unreliable. I therefore do not credit Pyett's assertion Kolenovic told him Reynolds had directed he not get weekend overtime. Pyett's claim, moreover, is inconsistent with record facts he had five (5) overtime opportunities, which is more than the majority of employees.[8]

As to the Union's contention Kolenovic denied the grievants overtime opportunities in accordance with instructions from Barak, I find the record lacks sufficient specificity to support the claim. In fact, Kolenovic disputes the contention she ever told any of the grievants Barak had instructed her against assigning them overtime. She also maintains Pyett and O'Connell refused overtime opportunities.

I credit Kolenovic's testimony. She was a believable witness who has no demonstrated motive to engage in conduct detrimental to the grievants or to any other employees. So, too, none of the grievants identified a single specific overtime opportunity for which they were available but which instead was given to another employee. Without such evidence, I cannot determine overtime opportunities for the grievants existed but were not offered, as the grievants contend; rather the weight of credible evidence leads me to the contrary conclusion such opportunities either were not available on the grievants' shifts, or were refused.

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[8] Pyett questions the accuracy of payroll records documenting be worked overtime assignments five (5) times during the relevant period are not correct. Transcript at 124.

Thus, while Phillips did not refuse overtime, and although his overtime was substantially less than the overtime of Hernandez, Gabriel Arredondo and Oscar Villegas, I note it was similar in frequency to that of Hana Nikac, Maria Toribio, Kenneth Pugh, Maria Matorell and Manuel De Los Santos. On this record, I am persuaded Phillips was an employee who received less overtime simply because he was working his regular shifts when most overtime opportunities arose.

In short, my careful review and consideration of the arbitration record convinces me there is insufficient evidence to sustain the Union's claim overtime was improperly rotated among the Company's employees. I therefore deny the Union's overtime grievance.

AWARD

1. The Company did not improperly fail to give the open handyman position to Pyett, or alternatively to O'Connell.

2. The Company did not fail properly to rotate overtime in accordance with the collective bargaining agreement.

3. Accordingly, the Union's grievances are denied.

DATE: August 10, 2005

SIGNATURE OMITTED

EARL R. PFEFFER
Contract Arbitrator

STATE OF NEW YORK :
SS:
COUNTY OF NEW YORK :

I hereby affirm pursuant to CPLR Sec. 7507 that I am the individual described in and who executed this instrument which is my Award.

DATE: August 10, 2005 /s/ Earl R. Pfeffer
EARL R. PFEFFER
Contract Arbitrator

ERP/dec

STATE OF NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION

CAPTION OMITTED

RESUME OF PANEL ARBITRATOR

Earl R. Pfeffer

Full-Time Arbitrator, Mediator

GRIEVANCE ARBITRATION EXPERIENCE:

From 1999 to present have served as grievance arbitrator in private and public sector cases involving a broad array of disciplinary and contractual issues. Permanent Panels: New York City Building Services Industry - Realty Advisory Board and S.E.I.U. Local 32B-32J; New York City Transit Authority/T.W.U. Local 100 Disciplinary Panel; State of New York - Unified Court System/Court Officers Benevolent Association of Nassau County; Westchester County/Westchester County Correction Officers Benevolent Association; Nassau County and CSEA, Local 830; Port Authority of New York/New Jersey and T.W.U. Local 1400; Nassau County and Sheriff's Officers Association. Ad Hoc Panels: American Arbitration Association; New Jersey Public Employment Relations Commission; New York State Employment Relations Board; New Jersey Slate Board of Mediation.

MEDIATION AND FACT-FINDING EXPERIENCE:

2000-2003. Deputy Director for Dispute Resolution. New York City Office of Collective

Bargaining, Principal Mediator of Labor Disputes between the City of New York and its Municipal Unions, Investigated impasses, Ad hoc Mediator, PERC, 2001 -2003.

INTEREST ARBITRATION EXPERIENCE:

EDUCATION

BA - San Francisco State University
MA - Columbia University
JD - State University of New York at Buffalo

PROFESSIONAL AFFILIATIONS:

New York State Bar Association; New Jersey State Bar Association; American Arbitration Association, Association for Conflict Resolution; Industrial Relations Research Association.

OTHER RELEVANT OR EQUIVALENT EXPERIENCE:

Deputy Chair, New York City Office of Collective Bargaining (2000-2003); Partner/Associate, Cohen, Weiss and Simon (1988-1999); Hearing Officer, Port Authority Employment Relations Panel; 1199, S.E.I.U. and Greater NY Healthcare Facilities Ass'n, Umpireship, NYC Dept. of Education/United Federation of Teachers School Based Option Staffing and Transfer Plan; Instructor, Mock Arbitration Course, Cornell/NYSSILR.

PER DIEM FEES:

GRIEVANCE: 1,200

ARBITRATION: $

CANCELLATION NOTICE AND FEE (if any): Full per diem if cancellation notice received less than two (2) weeks before hearing. (01/05)

CAPTION OMITTED

STIPULATION OF DISMISSAL

WHEREAS, plaintiffs Steven Pyett, Thomas O'Connell, and Michael Phillips commenced this action by summons and complaint filed on or about August 23, 2004 (the "Action"); and

WHEREAS, on or about March 4, 2005, all defendants served and filed the respective summons to plaintiff's complaint; and

NOW, THEREFORE, it is hereby stipulated by and between the undersigned counsel and the parties hereto, as follows:

1. The Action is hereby dismissed with prejudice and without costs to any party thereto.

2. This Stipulation may be executed in counterparts, and by facsimile, each of which shall be deemed an original and shall constitute the same Stipulation.

Dated: New York, NY
September 15, 2005

KREISBERG MAITLAND &
THORNHILL, LLP

SIGNATURE OMITTED

By: ______________________________
Jeffrey L. Kreisberg (JK-2599)
14 Penn Plaza
New York, New York 10122

(212) 629-4970
Attorneys for Plaintiffs

PROSKAUER ROSE LLP

SIGNATURE OMITTED

By: ______________________________

Paul Salvatore (PS-1880)
Brian S. Rauch (BR-5784)
1585 Broadway
New York, New York 10036
(212) 969-3000
Attorneys for Defendants
Pennsylvania Building Company and
14 Penn Plaza LLC

LAW OFFICE OF HARRY WEINBERG

SIGNATURE OMITTED

By: ______________________________

Harry Weinberg (HW-0574)
11 Beach Street, 8th Floor
New York, New York 10013
(212) 989-2908
Attorney for Defendant Temco
Service Industries, Inc.

OFFICE OF GENERAL COUNSEL, SEIU

SIGNATURE OMITTED

By: ______________________________

Judith I. Padow (JP-1151)
101 Ave. of Americas, 19th Floor
New York, New York 10013
(212) 388-3854
Attorney for Defendant Local
32BJ Service Employees
International Union

SIGNATURE OMITTED

So Ordered: ______________________

U.S.D.J.

9/27/05

CAPTION OMITTED

AFFIDAVIT OF CHARLES BORROK

CHARLES BORROK, being duly sworn, deposes and says:

1. I was a General Partner of Pennsylvania Building Company - which no longer exists as an entity - and am currently a Managing Member of 14 Penn Plaza LLC (collectively the "Company"). As such, I am familiar with the circumstances of this matter and make the affidavit upon information directly known by me.

2. Prior to August 2003 TEMCO provided, among other things, Lobby Attendants for the Pennsylvania Building at 225 West 34th Street for the Company.

3. In or about August 2003, in an effort to improve building security in response to post-9/11 security concerns across the city, while also obtaining economic savings the Company engaged Spartan Security, a security services contractor, to provide trained, licensed security guards to staff the front lobby desk (in addition to the rear entrance) of the Building.

4. As Temco's services were no longer needed for security, pursuant to the collective bargaining agreement, Temco transferred the three Plaintiffs to other positions in the

building without any decrease in their hourly rates of pay, benefits or seniority.

SIGNATURE OMITTED

Charles Borrok

Subscribed and sworn to
before me this 23rd day of
November 2005

SIGNATURE OMITTED

Notary Public

BARBARA WLODARSKI

CAPTION OMITTED

DECLARATION OF JEFFREY L. KREISBERG IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR TO COMPEL ARBITRATION AND FOR SANCTIONS

JEFFREY L. KREISBERG, hereby declares pursuant to 28 U.S.C. §1746 as follows:

1. I am a member in the firm of Kreisberg Maitland & Thornhill, LLP, attorneys for the Plaintiffs in the above action. I have personal knowledge of the facts set forth in this declaration, and submit same in opposition to Defendants' motion to dismiss Plaintiffs' Verified Complaint, or, in the alternative, to compel Plaintiffs to submit their age discrimination claims herein to arbitration under the collective bargaining agreement between the Defendants and Service Employees International, Local 32BJ, AFL-CIO (the "Union").

2. Annexed hereto as Exhibit "A" is a copy of Plaintiffs' Verified Amended Complaint in this action (The Rauch declaration in support of Defendants' motion annexes as Exhibit 1 a copy of the original Complaint.)

3. Annexed hereto as Exhibit "B" is the declaration of Plaintiff, Michael Phillips, dated January 18, 2006

4. Annexed hereto as Exhibit "C" is the declaration of the Plaintiff, Thomas O'Connell, dated January 8, 2006.

5. Annexed hereto as Exhibit "D" is the declaration of the Plaintiff, Steven Pyett, dated January 18, 2006.

6. Annexed hereto as Exhibit "E" is a true copy of the letter from Ronald A. Goldman, Esq., dated February 23, 2004, to the Contract Arbitrator, Earl Pfeffer, informing the arbitrator that the Union was withdrawing the Plaintiffs' age discrimination claim from the arbitration held herein under the Union's collective bargaining agreement with the Defendants.

7. In paragraphs 6 and 7 of the Rauch declaration, counsel mischaracterizes my statements to the Court at the October 11, 2005 conference. At that conference, I stated to the Court that it was Plaintiffs' contention that they were discriminated against because of their age by being removed from their former positions, replaced by much younger employees, and transferred to less desirable positions. I also stated that to the extent such actions by the Defendants may have been motivated by a desire to reduce costs, that would not be a defense to discriminatory action under the ADEA. While at this pre-discovery stage of the litigation (there has been absolutely no discovery conducted by either party), it is unknown to Plaintiffs whether in fact there even were any cost savings achieved as a

result of the Plaintiffs' removal, replacement by much younger employees, and transfer to less desirable positions, the legal authority set forth in Plaintiffs' memorandum of law, submitted herewith, confirms that cost savings is not a defense to age discrimination.

8. More importantly, the legal authority cited in Plaintiffs' memorandum of law makes absolutely clear that pre-discovery dismissal of their ADEA claim would be inappropriate, and that this Court should not compel Plaintiffs to submit their ADEA claim for binding arbitration under the Union's collective bargaining agreement.

9. It is true, as set forth in Paragraph 12 of the Rauch declaration, that both he and Paul Salvatore, a member of Proskauer Rose LLP, made repeated requests upon me to withdraw this case and submit Plaintiffs' age discrimination claims to arbitration under the Union's collective bargaining agreement, and that I declined to do so. They also both stated to me, on more than one occasion, that if Plaintiffs refused to do so, Defendants would seek sanctions. I still declined.

10. On the basis of the authorities cited in Plaintiffs' memorandum of law, Defendants' pre-discovery motion to dismiss on the merits is frivolous. Their motion to compel arbitration, while not frivolous, is unfounded and must be denied. If anyone deserves sanctions on this motion it is the Defendants and not the Plaintiffs.

11. I declare under penalty of perjury that the foregoing is true and accurate.

WHEREFORE, for all of the foregoing reasons, Defendants' motion should be denied in its entirety, with costs and attorneys fees awarded to Plaintiffs.

Dated: New York, New York
January 18, 2006

SIGNATURE OMITTED

JEFFREY L. KREISBERG

CAPTION OMITTED

DECLARATION OF MICHAEL PHILLIPS

MICHAEL PHILLIPS hereby declares pursuant to 28 U.S.C. § 1746 as follows:

INTRODUCTION

1. I am one of the Plaintiffs in this action. I have personal knowledge of the facts set forth in this declaration, and submit same in opposition to Defendants' motion to dismiss the First Amended Complaint herein, or, in the alternative, to refer Plaintiffs' age discrimination claims to arbitration under the collective bargaining agreement between the Defendants and Service Employees International Local 32BJ, AFL-CIO (the "Union").

BACKGROUND

2. My date of birth was February 28, 1948. I am 57 years of age.

3. I began my employment at the Pennsylvania Building on March 7, 1995. From that date until August 11, 2003, I held the position of night starter.

4. As night starter, I was assigned to work in the lobby of the building, a 22 floor office building at 14 Penn Plaza, 225 West 34th Street, in Manhattan. I was responsible for observing activities in the lobby of the building during my shifts, to enforce building rules regarding tenants and visitors, to deal with routine incidents, to obtain assistance in the event of emergency, to report any unusual events, and to perform related tasks. My job as night starter required limited

physical exertion. I was and remain a member of the Union. My annual salary in my last year as night starter was approximately $44,000. Included in that amount was overtime I had the opportunity to earn working after my regular hours as night starter on snow removal, fire system malfunctions, water leaks, freight elevator operation for tenant move-ins and move-outs, etc.

5. At all times during my employment as night starter at the Pennsylvania building, I have performed my duties in a fully competent and professional manner. I have never been suspended or disciplined in any way.

DISCRIMINATORY STATEMENTS

6. On at least three occasions during the period that I held the night starter position, Charles Borrok, the owner of the building, told me that I was too old to do the night starter job. On at least two of those occasions, his statements were made in the presence of four other building employees, all of whom are prepared to testify on my behalf at the trial of this action. Mr. Borrok also made my working conditions as night starter difficult. He prohibited me from sitting down during my shift, he made me keep the lobby very dark, he kept the heat off in the winter and the air conditioning off in the summer, I was prohibited from listening to a radio, and I was not allowed to drink coffee in the lobby.

7. In addition to the above statements made to me by Mr. Borrok regarding my age, I was also told on more than one occasion by Fred Farrugia, building superintendent and the person in charge of the building on a day to day basis, that Mr. Borrok did not like the older employees in the

building (the Plaintiffs being the only older employees) and would prefer to have younger men. Mr. Farrugia told me that he thought my job, and the jobs of the Plaintiffs Steven Pyett and Thomas O'Connell, were in jeopardy because Mr. Borrok thought we were too old to be working in the lobby.

REPLACEMENT BY SPARTAN SECURITY

8. On August 11, 2003, I was removed from my night starter position and replaced by an employee of Spartan Security, which I understand is an affiliated company of the Defendant Temco Service Industries, which provides staff to the building.

9. My Spartan Security replacement was at least 20 years younger than me. He had never been previously employed in the building and therefore had no building seniority. Unlike the rules that were applied to me, I have observed my replacement sitting down in the lobby, listening to the radio, watching television, talking on the phone, playing video games on the computer, and running the heat in the winter and the air conditioning in the summer.

10. From the date my replacement was brought in on August 11, 2003, until March 2005, I was reassigned to cleaning offices in the building. I was required to clean offices on five different floors, whereas the other cleaning staff, all women, were required to work on only two floors. I was required to clean 42,000 square feet of office space per shift, whereas the industry and union standard is 32,000 square feet per shift.

11. I complained about the excessive work I was required to do to the cleaning supervisor, Ms.

Kolenovic. She told me that building management was closely monitoring the amount of footage being assigned to me, and that she could not decrease it. She also told me that management actually wanted her to give me more footage to clean, but that she told them she could not do so without affecting the work assigned to the other cleaning women.

12. In addition, for the first 39 weeks of my new assignment, August 11, 2003 through May 13, 2004, I was denied a work uniform and had to work in my personal clothing and was never reimbursed for cleaning my clothes, in violation of the Union's CBA. Moreover, since my reassignment I have been denied the opportunity to work virtually any overtime. Thus, although my hourly pay rate was unchanged when I was replaced and transferred, my annual income has decreased in the amount of approximately $ 3,000 since my transfer to the cleaner position.

13. My cleaner position was much less desirable than my former position of night starter. It was much more physically demanding. It was a position of much less status among my co-workers and the tenants in the building. It afforded me no opportunity to earn overtime compensation.

14. Effective March 2005, I was and am assigned to the hall and lobby porter position, which was held by Thomas O'Connell from the date of his removal from the night watchman position in August 2003, until the date of his retirement in June 2004. In that position, I clean the hall and lobby floors, elevators and lobby glass and desk. That position is better than the cleaner position but far less desirable than the

starter position, because it is more physically demanding and does not afford me the opportunity to earn overtime or premium pay.

UNION GRIEVANCE

15. I duly filed a grievance with my Union, Local 32BJ, regarding my removal from the night starter position and reassignment to a cleaning position. I complained that my reassignment was done in violation of the Union's collective bargaining agreement with the building and Temco, and because of my age.

16. My grievance was consolidated with the grievances filed by the Plaintiffs Pyett and O'Connell regarding their removal from their positions and reassignment, and in the case of Mr. Pyett his being denied promotion to the handyman position, and scheduled for an arbitration hearing before the Contract Arbitrator, selected by the Union and the Defendants.

17. On February 13, 2004, shortly after the first day of the arbitration hearing, I attended a meeting at the offices of Kreisberg Maitland & Thornhill, LLP, Plaintiffs' attorneys. Also present at that meeting were Ronald Goldman, Esq., attorney for 32B-J, who presented Plaintiffs' case at the arbitration, the other two Plaintiffs, and Jeffrey Kreisberg, Esq.

18. At that meeting, Mr. Goldman informed us that the Union would not be pursuing Plaintiffs' claims of age discrimination, or that we were wrongfully transferred, in the arbitration. He told us that our other claims of violation of the collective bargaining agreement, regarding denial of overtime, and, in the case of Pyett, that he was wrongfully denied promotion to

the handyman position, would be pursued in the arbitration. Mr. Goldman stated that since the Union had consented to Spartan Security being brought into the building (even though it was at that time a non-union company), the Union could not now contest our replacement by Spartan Security or our transfer to other, less desirable positions. Mr. Goldman gave us no explanation as to why our age discrimination claims were not being pursued.

19. About one week later, my attorneys, Kreisberg Maitland & Thornhill, LLP, received a copy of a letter from Mr. Goldman to the Contract Arbitrator, Earl Pfeffer, dated February 23, 2005, informing him that the Union would not pursue the Plaintiffs' claims of age discrimination and wrongful transfer in the arbitration, but that our other claims would go forward. (Kreisberg declaration, Exhibit E.)

20. As acknowledged in ¶ 2 of the affidavit of Larry Engelstein, Esq., General Counsel of Local 32B-J, submitted in support of Defendants' motion to dismiss or compel arbitration, "the Union withdrew Plaintiffs' age discrimination claim before the arbitration concluded."

21. On August 10, 2005, the Contract Arbitrator issued his Opinion and Award, denying all of the Plaintiffs' grievances. (See Rauch declaration, Exhibit 3.)

22. Defendants have claimed that I did not suffer an adverse employment action by virtue of my removal from my night starter position to my position as a cleaner because my hourly pay rate was unchanged. That contention is patently

incorrect. My cleaner position is far less desirable than my night starter position. The cleaner position is much more physically demanding. It has much less status. I have lost the opportunity to earn the overtime I earned in the night starter position, which has resulted in an actual reduction of my annual income.

23. Since the Union withdrew my age discrimination claim from arbitration because it did not want to pursue it, in view of the Union's having consented to Spartan Security coming into the building, and since the arbitration forum is one established by the Defendants and the Union, I do not believe that my age discrimination claim would receive a fair hearing in an arbitration held before the Contract Arbitrator under the collective bargaining agreement and I am therefore unwilling to submit my age discrimination claim to arbitration, and wish instead to pursue such claim in this Court.

24. I declare under penalty of perjury that the foregoing is true and accurate.

WHEREFORE, for all of the foregoing reasons, and those submitted in the accompanying declarations and Plaintiffs' memorandum of law submitted herewith, it is respectfully requested that Defendants' motion to dismiss or compel arbitration be denied, with costs and attorneys fees being awarded to the Plaintiffs.

Dated: New York, New York
January 18, 2006

SIGNATURE OMITTED

MICHAEL PHILLIPS

CAPTION OMITTED

DECLARATION OF THOMAS O'CONNELL

THOMAS O'CONNELL hereby declares pursuant to 28 U.S.C. §1746 as follows:

INTRODUCTION

1. I am one of the Plaintiffs in this action. I have personal knowledge of the facts set forth in this declaration, and submit same in opposition to Defendants' motion to dismiss the First Amended Complaint herein, or, in the alternative, to refer Plaintiffs' age discrimination claims to arbitration under the collective bargaining agreement between the Defendants and Service Employees International, Local 32BJ, AFL-CIO (the "Union").

BACKGROUND

2. My date of birth was June 19, 1942. I am 63 years of age.

3. I began my employment at the Pennsylvania building in 1969. From then, until the date of my retirement on June 30, 2004, minus a six year period from 1982 through 1988 during which I was not employed at the building, I held a number of different positions at the building. When I was hired in 1969, I was a security man. In 1977, I became a watchman. In 1988, when I returned to the building, I was a handyman. In 1989, I became a freight operator. In 1992, I became a night lobby watchman.

4. As night lobby watchman, I was responsible for maintaining security in the building during the overnight hours. I handled

routine incidents which arose and obtained assistance when necessary.

5. The position was mostly sedentary. It required minimal physical exertion on my part, which was helpful to me because I had a number of physical problems, such as having only one lung, high blood pressure and swollen legs/ankles, which prevented me from performing the more physically demanding jobs at the building. During my years of employment at the building, I developed a personal relationship with the owner, Mr. Borrok. I often discussed my physical problems with him. He was well aware of them.

6. In my night lobby watchman position I was regularly assigned to work weekends, for which I received premium pay, and I also regularly worked other overtime hours. My total pay in the final year I held the watchman position was approximately $68,500.

7. At all times during my employment as night lobby watchman at the Pennsylvania building, I have performed my duties in a fully competent and professional manner. I have never been suspended or disciplined in any way.

REPLACEMENT BY SPARTAN SECURITY

8. On August 11, 2003, I was removed from my night starter lobby watchman position and replaced by an employee of Spartan Security, which I understand is an affiliated company of the Defendant Temco Service Industries, which provides staff services to the building.

9. My Spartan Security replacement was more than 20 years younger than me. He had

never been previously employed in the building and therefore had no building seniority.

10. Upon my replacement as watchman on August 11, 2003, I was reassigned to the position of night porter. In that position, I was required to clean the hall and lobby floors, elevators and lobby glass and desk.

11. That work was very physically demanding, too much for me to handle in my physical condition and at my age. As a result, on June 30, 2004, I was forced to retire. I was planning on working until I was 65 years of age, which I would have done had I remained in my watchman position.

12. In addition, since I was transferred to the night porter position, I lost all of the overtime pay I had been earning in my watchman position. My total pay went from approximately $68,000 per year to approximately $37,500 per year. Thus, I suffered a loss of about $18,000 from the date of my transfer to the date of my forced retirement.

UNION GRIEVANCE

13. I duly filed a grievance with my Union, Local 32BJ, regarding my removal from the night watchman position and reassignment to the night porter position. I complained that my reassignment was done in violation of the Union's collective bargaining agreement with the building and Temco, and because of my age.

14. My grievance was consolidated with the grievances filed by the Plaintiffs Pyett and Phillips regarding their removal from their positions and reassignment, and, in the case of Pyett, his failure to be promoted to the handyman position, and

scheduled for an arbitration hearing before the Contract Arbitrator, selected by the Union and the building.

15. On February 13, 2004, shortly after the first day of the arbitration hearing, I attended a meeting at the offices of Kreisberg Maitland & Thornhill, LLP, Plaintiffs' attorneys. Also present at that meeting were Ronald Goldman, Esq., attorney for 32BJ, who presented Plaintiff's case at the arbitration, the other two Plaintiffs, and Jeffrey Kreisberg, Esq.

16. At that meeting, Mr. Goldman informed us that the Union would not be pursuing Plaintiffs' claims of age discrimination, or that we were wrongfully transferred, in the arbitration. He told us that our other claims of violation of the collective bargaining agreement, regarding denial of overtime, and, in the case of Mr. Pyett, that he was wrongfully denied promotion to the handyman position, would be pursued in the arbitration. Mr. Goldman stated that since the Union had consented to Spartan Security being brought into the building (even though it was at that time a non-union company), the Union could not now contest our replacement by Spartan Security or our transfer to other, less desirable positions. Mr. Goldman gave us no explanation as to why our age discrimination claims were not being pursued.

17. About one week later, my attorneys, Kreisberg Maitland & Thornhill, LLP, received a copy of a letter from Mr. Goldman to the Contract Arbitrator, Earl Pfeffer, dated February 23, 2004, informing him that the Union would not pursue the Plaintiffs' claims of age discrimination and wrongful transfer in the arbitration, but that our

other claims would go forward. (Kreisberg declaration, Exhibit E)

18. As acknowledged in ¶ 2 of the affidavit of Larry Engelstein, Esq., General Counsel of Local 32BJ, submitted in support of Defendants' motion to dismiss or compel arbitration, "the Union withdrew Plaintiffs' age discrimination claim before the arbitration concluded".

19. On August 10, 2005, the Contract Arbitrator issued his Opinion and Award, denying all of the Plaintiffs' grievances. (See Rauch declaration, Exhibit 3.)

20. Defendants have claimed that I did not suffer an adverse employment action by virtue of my removal from the night lobby watchman position and my transfer to the position of night porter, because my hourly pay rate was unchanged. That contention is patently incorrect. My porter position was far less desirable than my watchman position. The porter position was much more physically demanding, and I simply could not perform it. In addition, I lost the opportunity to earn the overtime I earned in the watchman position, which resulted in my actual loss of pay in the amount of about $18,000.

21. Since the Union withdrew my age discrimination claim from arbitration because it did not want to pursue it, in view of the Union's having consented to Spartan Security coming into the building, and since the arbitration forum is one established by the Defendants and the Union, I do not believe that my age discrimination claim would receive a fair hearing in an arbitration held before the Contract Arbitrator under the collective bargaining agreement, and I am therefore

unwilling to submit my age discrimination claim to arbitration and wish instead to pursue such claim in this Court.

22. I declare under penalty of perjury that the foregoing is true and accurate.

WHEREFORE, for all of the foregoing reasons, and those submitted in the accompanying declarations and Plaintiffs' memorandum of law submitted herewith, it is respectfully requested that Defendants' motion to dismiss or compel arbitration be denied, with costs and attorneys fees being awarded to the Plaintiffs.

Dated: New York, New York
January 18, 2006

SIGNATURE OMITTED

THOMAS O'CONNELL

CAPTION OMITTED

DECLARATION OF STEVEN PYETT

STEVEN PYETT hereby declares pursuant to 28 U.S.C. § 1746 as follows:

INTRODUCTION

1. I am one of the Plaintiffs in this action. I have personal knowledge of the facts set forth in this declaration, and submit same in opposition to Defendants' motion to dismiss the First Amended Complaint herein, or, in the alternative, to refer Plaintiffs' age discrimination claims to arbitration under the collective bargaining agreement between the Defendants and Service Employees International, Local 32BJ, AFL-CIO (the "Union").

BACKGROUND

2. My date of birth was October 18, 1952. I am 53 years of age.

3. I began my employment at the Pennsylvania Building in January 1970, as an elevator operator. From that date until 1989, I held various positions: 1972 - porter; 1974 - handyman; 1976 - night porter; 1982 - day elevator starter; 1983 - freight elevator operator; 1984 - night porter and then night starter. I am a member of Local 32BJ.

4. In 1989, I became night lobby watchman. In that position, I was stationed in the building lobby and was responsible for making sure no unauthorized person entered the building and to deal with any problems that arose on my shift. I either handled such problems myself, or obtained

assistance as necessary. In 1997, I completed a program and became a licensed security guard. That license has since lapsed, but can be renewed simply by paying a small fee.

5. My night lobby watchman position required little physical exertion. It was essentially a sedentary position. I also received premium pay for weekend shifts and had the opportunity to work extensive overtime, which I often did. In my last year of employment as night lobby watchman, with premium pay, I earned approximately $60,000.

6. At all times during my employment as a night lobby watchman at the Pennsylvania building, I have performed my duties in a fully competent and professional manner. I have never been suspended or disciplined in any way.

REPLACEMENT BY SPARTAN SECURITY

7. On August 11, 2003, I was removed from my night lobby watchman position and replaced by an employee of Spartan Security, which I understand is an affiliated company of the Defendant, Temco Service Industries, which provides staff to the building.

8. My Spartan Security replacement was at least 20 years younger than me. He had never been previously employed in the building and therefore had no building seniority.

9. Since my replacement was brought in on August 11, 2003, I have been reassigned to the position of night porter. In that position, I am required to pick up and place in the building dumpsters 20 cubic yards of trash per shift, plus mop more than 7,000 square feet of floor space in

one hour. In addition, I have lost the premium pay for weekend shifts and overtime opportunities I previously had.

10. As a result of my transfer from the night lobby watchman position to the night porter position, I went from a physically non-demanding position, in which I had the opportunity to earn substantial premium pay and overtime compensation, to one which is very physically demanding, and which affords me virtually no opportunity to earn premium pay or overtime, as a result of which I have lost approximately $ 18,000 per year in pay.

11. At the time Spartan Security was brought in to the building, there were four building employees working in the lobby: myself, then age 51, the other two Plaintiffs, Michael Phillips, then age 55, and Thomas O'Connell, then age 61; and Michael Vecchio, who is at least 10 years younger than me. After Spartan Security was brought in, I was removed from my night lobby watchman position and transferred to the night porter position; Michael Phillips was removed from the night starter position and transferred to cleaner; and Thomas O'Connell was removed from the night watchman position and transferred to the night porter position. Michael Veechio, by far the youngest of the four affected employees, was promoted to handyman, has been given additional overtime opportunities, and his pay has been substantially increased.

UNION GRIEVANCE

12. I duly filed a grievance with my Union, Local 32BJ, regarding my removal from the night watchman position and reassignment to the night

porter position. I complained that my reassignment was done in violation of the Union's collective bargaining agreement with the building and Temco, and because of my age. I also complained that I was wrongfully denied promotion to the handyman position, in favor of Mr. Veechio.

13. My grievance was consolidated with the grievances filed by the Plaintiffs Phillips and O'Connell regarding their removal from their positions and reassignment, and scheduled for an arbitration hearing before the Contract Arbitrator, selected by the Union and the Defendants.

14. On February 13, 2004, after the first day of the arbitration hearing, I attended a meeting at the offices of Kreisberg Maitland & Thornhill, LLP, Plaintiffs' attorneys. Also present at that meeting were Ronald Goldman, Esq., attorney for 32BJ, who presented Plaintiffs' case at the arbitration, the other Plaintiffs, Mr. Phillips and Mr. O'Connell, and Jeffrey Kreisberg, Esq.

15. At that meeting, Mr. Goldman informed us that the Union would not be pursuing the Plaintiffs' claims of age discrimination, or that we were wrongfully transferred, in the arbitration. He told us that our other claims of violation of the collective bargaining agreement, regarding denial of overtime, and, in my case, that I was wrongfully denied promotion to the handyman position, would be pursued in the arbitration. Mr. Goldman stated that since the Union had consented to Spartan Security being brought into the building (even though it was at that time a non-union company with non-union employees), the Union could not now contest our replacement by

Spartan Security or our transfer to other, less desirable positions. Mr. Goldman gave us no explanation as to why our age discrimination claims were not being pursued.

16. About one week later, my attorneys, Kreisberg Maitland & Thornhill, LLP, received a copy of a letter from Mr. Goldman to the Contract Arbitrator, Earl Pfeffer, dated February 23, 2005, informing him that the Union would not pursue the Plaintiffs' claims of age discrimination and wrongful transfer in the arbitration, but that our other claims would go forward. (Kreisberg declaration, Exhibit E.)

17. As acknowledged in ¶2 of the affidavit of Larry Engelstein, Esq., General Counsel of Local 32BJ, submitted in support of Defendants' motion to dismiss or compel arbitration, "the Union withdrew Plaintiffs' age discrimination claim before the arbitration concluded". (Actually, as set forth in its February 23, 2005 letter, the Union withdrew the claim before the arbitration hearing began.)

18. On August 10, 2005, the Contract Arbitrator issued his Opinion and Award, denying all of the Plaintiffs' grievances. (See Rauch declaration, Exhibit 3.)

19. Defendants have claimed that I did not suffer an adverse employment action by virtue of my removal from the night watchman position and my transfer to the night porter position, because my hourly pay rate was unchanged. That contention is patently incorrect. My night porter position is far less desirable than my night porter position. The porter position is much more physically demanding. It has much less status. I

have lost the opportunity to earn the premium pay for weekend shifts and overtime I earned in the night watchman position, which has resulted in an actual reduction of my annual income in the amount of approximately $20,000 per year.

20. Since the Union withdrew my age discrimination claim from arbitration because it did not want to pursue it, in view of the Union's having consented to Spartan Security coming into the building, and since the arbitration forum is one established by the Defendants and the Union, I do not believe that my age discrimination claim would receive a fair hearing at the arbitration held before the Contract Arbitrator under the collective bargaining agreement, and I am therefore unwilling to submit my age discrimination claim to arbitration, and wish instead to pursue such claim in this Court.

21. I declare under penalty of perjury that the foregoing is true and accurate.

WHEREFORE, for all of the foregoing reasons, and those submitted in the accompanying declarations and Plaintiffs' memorandum of law submitted herewith, it is respectfully requested that Defendants' motion to dismiss or compel arbitration be denied, with costs and attorneys fees being awarded to the Plaintiffs.

Dated: New York, New York
January 18, 2006

SIGNATURE OMITTED

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JUSTIN H. CORDELLO

February 23, 2004

Arbitrator Earl Pfeffer
Office of the Contract Arbitrator 50 West 23rd Street
New York, New York

Re: *In the matter of the arbitration between SEIU Local 32BJ and Tellico Services*
225 West 34th Street
Case # 19255
Steven Pypelt, Michael Phillips, Thomas O'Connell

Dear Arbitrator Pfeffer:

On September 16, 2003 the Union commenced the above referenced arbitration against Temco Services. The matter was assigned to you and a hearing was scheduled and held on February 2, 2004. Please be advised that the Union is withdrawing from the arbitration demand, the age discrimination claim and the Union's challenge to the propriety of the August 11, 2003 shift and duty reassignment. The remaining portions of the complaint will proceed as scheduled on March 18, 2004.

Respectfully yours,

SIGNATURE OMITTED

Ronald A. Goldman

RAG:ys

cc: Jodi Goldman, Esq.
Krystyna Rosario
Harry Weinberg, Esq,
Rick Arnarosa
Realty Advisory Board on Labor Relations
Jeffrey Kreisberg, Esq.

CAPTION OMITTED

NOTICE OF APPEAL

PLEASE TAKE NOTICE THAT defendants Pennsylvania Building Company and 14 Penn Plaza LLC, hereby appeal to the United States Court of Appeals for the Second Circuit from this Court's Memorandum and Order of the Court dated May 31, 2006, and entered on June 1, 2006, insofar as that Order denied Defendants' motion to compel arbitration.

Dated: New York, NY
June 28, 2006

PROSKAUER ROSE LLP

SIGNATURE OMITTED

By: ______________________________
Paul Salvatore (PS-1880)
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(212) 969-3000

Dated: June 28, 2006
New York, New York

CAPTION OMITTED

NOTICE OF APPEAL

PLEASE TAKE NOTICE THAT defendant Temco Service Industries, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from this Court's Memorandum and Order of the Court dated May 31, 2006 and entered on June 1, 2006, a copy of which is annexed hereto, insofar as that Order denied Defendants' motion to compel arbitration.

Dated: New York, NY
June 28, 2006

Yours, etc.

LAW OFFICES OF HARRY WEINBERG
Attorney for Defendant
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SIGNATURE OMITTED

BY: _
HARRY WEINBERG (HW-0574)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT
JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of August, two thousand and seven.

Before:
Hon. José A. Cabranes,
Hon. Reena Raggi,
Circuit Judges,
Hon. Edward R. Korman,
District Judge.[*]

CAPTION OMITTED

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said District Court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
Clerk
by
SIGNATURE OMITTED
Molly A Guptill
Acting Motions Staff Attorney

Issued as Mandate:
8-23-07

---

[*] The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

PETITIONER'S BRIEF

(91)

(4)

FILED
MAY 5 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-581

IN THE

Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,

Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Is an arbitration clause contained in a collective bargaining agreement, freely negotiated by a union and an employer, which clearly and unmistakably waives the union members' right to a judicial forum for their statutory discrimination claims, enforceable?

LIST OF PARTIES

Pursuant to Rule 24.1(b), the names of the parties appearing before the U.S. Court of Appeals for the Second Circuit appear in the caption. Pennsylvania Building Company LLC, listed as an appellee below, was the predecessor of 14 Penn Plaza LLC.

The Rule 29.6 Statement in the Petition remains accurate.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 498 F.3d 88 (2d Cir. 2007). Pet. App. 1a. The Second Circuit affirmed the decision of the United States District Court for the Southern District of New York, reported at 2006 U.S. Dist. LEXIS 35952 (S.D.N.Y. June 1, 2006). Pet. App. 13a. The District Court referred to its prior decision in *Granados v. Harvard Maintenance, Inc.*, which is reported at 2006 U.S. Dist. LEXIS 6918 (S.D.N.Y. Feb. 22, 2006), to explain its reasoning. Pet. App. 23a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 2007. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 2-4. Section 2 provides:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit

> to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

FAA §§ 3 and 4 are reprinted at Pet. App. 49a-51a. Plaintiffs filed this action pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, reproduced at Pet. App. 52a-66a. The case also involves the National Labor Relations Act, 29 U.S.C. § 159(a), which provides in pertinent part:

> § 9(a) Exclusive representatives; employees' adjustment of grievances directly with employer.
>
> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

STATEMENT OF THE CASE

The Federal Arbitration Act provides that "[a] written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Here, without citing any such grounds, and despite a "written provision" in a collective bargaining "contract" calling for the arbitration of their age discrimination claims, three employees filed such claims in federal court, and opposed defendants' suggestion of arbitration and subsequent motion to compel arbitration of their claims in the arbitral forum called for by that collective bargaining contract. The district court denied the motion to compel, and the Second Circuit affirmed on the ground that no union-negotiated agreement to arbitrate statutory employment discrimination claims is ever enforceable, no matter how clear and explicit its terms. The Second Circuit's decision draws a distinction between agreements to arbitrate such claims made by individual employees, which the Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), held are enforceable, and comparable agreements made by unions on behalf of their members, notwithstanding the lack of any statutory basis whatsoever for that distinction.

The applicable collective bargaining agreement expressly prohibits discrimination on the basis of any factors prohibited by federal, state, and local anti-discrimination law; provides that "all such claims" alleging discrimination are subject to the contractual grievance and arbitration procedure "as the sole and exclusive remedy;" and directs arbitrators to "apply appropriate law in rendering decisions based upon claims of discrimination." Pet. App. 48a. That agreement, made by the Respondents' duly authorized collective bargaining agent, and voted upon and ratified by the union membership, should have been enforced just as if Respondents had signed it themselves.

1. For more than seventy years, Local 32BJ of the Service Employees International Union ("Local 32BJ" or the "Union") has served as the exclusive bargaining representative of employees within the building services industry in New York City, including building cleaners, porters, and doorpersons. In that capacity, the Union has exclusive authority to bargain on behalf of its members over their rates of pay, wages, hours of employment, and other "conditions of employment." 29 U.S.C. § 159(a). Since the 1930s, the Union has engaged in industry-wide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (the "RAB"), the New York City real estate industry's multi-employer bargaining association, to set the terms and conditions of its members' employment.

The agreement between the Union and the RAB is embodied in their Collective Bargaining Agreements for Contractors and Building Owners (the "CBA"). The CBA, voted upon and ratified by the union membership, covers a variety of terms and conditions of employment, including wages, hours, benefits, grievance procedure, strikes, stoppages, and lockouts. It expressly prohibits discrimination in employment — an important goal for labor, management, and employees in the "melting pot" of the New York City labor market. Pet. App. 48a. It also broadly provides for arbitration to decide all differences between the parties over the "interpretation, application or performance" of the agreement, including claims arising out of the employment relationship between the employer and the employees. Pet. App. 43a.

Articles V and VI of the CBA provide for a number of specified "Contract Arbitrators," who work under the aegis of the Office of Contract Arbitrator ("OCA"), to decide all differences arising between the parties that are not resolved directly by the Union and employer through a two-step grievance procedure. Pet. App. 43a-47a. The costs of arbitration are generally shared by the Union and the RAB. *Id.* Arbitrators are required to issue a written award within thirty days after the close of the hearing, are required to apply "appropriate law" as regards discrimination claims, and are empowered to "grant any remedy required to correct a violation . . . including, but not limited to, damages and mandatory orders." Pet. App. 45a, 48a.

2. Beginning in 1999, the Union and the RAB agreed to a provision in the CBA that expressly requires employees to submit any claims of employment discrimination, including claims of age discrimination arising under federal, state, and city law, to binding arbitration under the CBA's grievance and dispute resolution procedures. According to that provision:

> § 30. NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any

> other similar laws, rules or regulations. *All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations*. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

Pet. App. 48a (emphasis added.) The bargaining parties specifically crafted this language to meet the requirement, set forth in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998), that any waiver of rights to adjudicate statutory claims be "clear and unmistakable." It is undisputed that the waiver set forth in the CBA is clear and unmistakable. Pet. App. 6a, 21a, 48a.

This arbitration clause pertaining to discrimination claims was heavily negotiated by Local 32BJ and the RAB. With the bargaining leverage that comes from representing approximately 80,000 employees in the industry, the Union gained sizable wage and benefit enhancements, as well as other favorable provisions, in exchange for its agreement to arbitrate its members' statutory employment claims. Without this arbitration provision, many of the Union-represented building service workers would as a practical matter need to become *pro se* plaintiffs to remedy any perceived discrimination, a daunting task for any individual, but especially for the large percentage of immigrant building service workers for whom English is a second language. Similarly, those employees fortunate enough to obtain an attorney would be required to pay fees and perhaps a percentage of any recovery. By contrast, under the arbitration provision in the CBA, these same employees are provided an attorney by the Union at no cost to them, and do not pay administrative fees (*i.e.*, arbitrator or forum fees), which are generally apportioned between the RAB and the Union.[1]

In addition, arbitration of discrimination claims minimizes duplicative efforts and resolves disputes quickly, less expensively, fairly, and effectively. Many discrimination claims arise out of the same facts and circumstances as contractual grievances alleging violations of the CBA. For example, an employee who asserts that he was discharged without just cause may also claim that his discharge was the result of age discrimination. Consolidating the legal process allows one factfinder (generally an employment attorney serving as arbitrator) to consider the facts and circumstances that encompass both claims, and make determinations on the related claims. The ability to consolidate the actions results in economies of scale for all parties involved, and ensures consistent rulings on the related issues, while providing employees and employers with the full scope of remedies and defenses available under the anti-discrimination laws.[2]

---

[1] While the Union provides an attorney without charge, employees may also retain private counsel at their own expense, as was the case here.

[2] The arbitrators under the CBA include members of the labor and employment bar, specifically designated by the parties, who are knowledgeable concerning employment discrimination jurisprudence generally and have specific expertise in claims arising in the real estate industry. *See* Pet. App. 47a, Joint Appendix ("JA") 68-69.

3. Respondents, who are all members of Local 32BJ, are employees and a now-retired employee of Temco Service Industries, Inc. ("Temco"), a building service and cleaning contractor. Prior to August 2003, they worked as night watchmen/porters in 14 Penn Plaza LLC's commercial office building located at 225 West 34th Street in New York City. They are all covered under the CBA.

In or about August 2003, in an effort to improve building security in response to post–9/11 security concerns, 14 Penn Plaza engaged Spartan Security, a unionized security services contractor, to provide trained, licensed security guards to staff the front lobby desk and the rear entrance of the building. As a result, Temco's services were no longer needed in these locations. In compliance with the CBA, Temco reassigned Respondents to equivalent duties in other locations in the building. Pet. App. 4a; JA 72-73.

4. Respondents were dissatisfied with these changes, and Local 32BJ filed a grievance about the reassignments under the CBA's dispute resolution procedures, raising contractual and age discrimination claims. JA 8, 31-33, 83, 89, 95-96; Pet. App. 4a. Prior to the arbitration hearing, the Union withdrew the portion of the grievance alleging age discrimination and Respondents declined repeated requests by the employer that they arbitrate those claims. JA 45-46, 76, Pet. App. 17a.[3] At the arbitration hearings before

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[3] On February 18, 2005, while the arbitration was pending, counsel for Respondents again advised Petitioners' counsel by fax that Respondents declined to arbitrate their age

(Cont'd)

Arbitrator Earl Pfeffer,[4] Respondents were accompanied by their private attorney in addition to Union-provided counsel. JA 49.

While the arbitration was pending, Respondents filed age discrimination charges with the EEOC and also a "hybrid" Section 301/Duty of Fair Representation (DFR) lawsuit against 14 Penn Plaza, Temco, and the Union, alleging in part that the Union breached its duty of fair representation by withdrawing their age discrimination claims from the arbitration. JA 8-9, 22. The EEOC concluded that the evidence presented failed to indicate that an ADEA violation had occurred, and issued a right-to-sue letter. Despite the agreement in Section 30 of the CBA that "all such claims" would be subject solely and exclusively to arbitration, on September 23, 2004, Respondents filed this lawsuit in federal court alleging that their reassignment violated federal, state, and city laws prohibiting age discrimination. JA 1, 10-13.

On August 10, 2005, Arbitrator Pfeffer issued a 19-page opinion denying all of Respondents' contractual claims. JA 49-67. Respondents shortly thereafter withdrew their Section 301/DFR lawsuit with prejudice. JA 70.

(Cont'd)

discrimination claims, as they had been repeatedly asked to do. While not contained in the Record, Respondents' then-counsel of record agreed that Petitioners could cite this fax, and it has been lodged with the Clerk.

[4] Mr. Pfeffer is an experienced employment lawyer, formerly a partner at a union-side law firm, who works full time as a grievance arbitrator in private and public sector cases in unionized industries. JA 68-69.

On November 23, 2005, the employer[5] moved to compel Respondents to arbitrate their claims pursuant to Sections 3 and 4 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 3-4, based on the clear agreement in the CBA that "all such claims" would be subject to arbitration "as the sole and exclusive remedy for violations." JA 40-46, Pet. App. 48a.[6] It was undisputed that the employer had repeatedly asked the employees to arbitrate their age discrimination claims while the arbitration was proceeding (*e.g.*, JA 76), and that an arbitral forum was still available for resolving the employees' claims.[7] The employees opposed the motion to compel on the ground that they were not bound as a matter of law by the CBA's promise that their discrimination claims would be resolved exclusively by arbitration. JA 74-78.

The district court denied the motion to compel arbitration based on "binding Second Circuit precedent that even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." Pet App. 21a.

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[5] For convenience, Petitioners herein – defendants in the district court – are referred to as the "employer."

[6] The employer moved, alternatively, to dismiss for failure to state a claim.

[7] In support of the employers' motion for an order "directing Plaintiffs to arbitrate their age claims pursuant to the Federal Arbitration Act" (JA 42), the Union provided an affidavit consenting to the use of the Office of Contract Arbitrator "created under the Collective Bargaining Agreement . . . as the forum for Plaintiffs' private attorney to pursue Plaintiffs' statutory age discrimination claims, as long as the parties to this lawsuit, and not the Union, pay the costs associated with the arbitration." Pet. App. 42a.

5. On appeal, acknowledging that this Court's precedents left the central question unresolved, the panel affirmed, considering itself bound by the Second Circuit's earlier decision in *Rogers v. New York Univ.*, 220 F.3d 73 (2d Cir.) (*per curiam*), *cert. denied*, 531 U.S. 1036 (2000), that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), rendered collectively bargained agreements to arbitrate statutory discrimination claims categorically unenforceable. Pet. App. 1a. According to the Second Circuit, "*Gardner-Denver* held that a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress . . . ." Pet. App. 6a n.3.

Regardless of the clarity and explicitness of a collectively bargained agreement providing that all statutory discrimination claims would be subject solely and exclusively to arbitration, the Second Circuit held such promises are unenforceable under the FAA, because it perceived *Gardner-Denver* to have prohibited such enforcement. Pet. App. 8a-9a. The Court of Appeals gave no further reasons for its holding, except for its concern that the interests of the Union and the plaintiffs could be in conflict. Pet. App. 11a n.5. It failed to explain why, since the Respondents were free to arbitrate without the Union, such a conflict mattered at all or was a reason not to enforce the clear promise, binding on Respondents under the CBA, that all statutory discrimination claims would be subject "solely and exclusively" to arbitration. Pet. App. 48a.

Proceedings in the trial court have remained stayed pending appellate review.

SUMMARY OF ARGUMENT

Congress expressly provided in the FAA that contractual promises to arbitrate "shall be valid, irrevocable, and enforceable," except where grounds exist for the revocation of any contract. The FAA applies broadly to agreements to arbitrate all types of legal claims, including claims arising under federal and state statutes, *see, e.g., Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), so long as the agreement to do so is clear and unmistakable, *see Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998). The FAA embodies a national policy favoring arbitration, especially in the employment context where avoidance of costly litigation is an important benefit. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

Despite these principles, the Second Circuit refused to enforce the express agreement which had been reached between Local 32BJ and the Petitioners, embodied in their collective bargaining agreement, to arbitrate statutory age discrimination claims. The appeals court did not question, and there is no dispute, that this arbitration provision met the "clear and unmistakable" standard set out in *Wright*. There is no dispute that the Union, as Respondents' exclusive bargaining representative, was authorized and entitled to bargain over all terms and conditions of their employment. And there is no dispute that in this case, Respondents were given an unimpeded opportunity to arbitrate their claims, which they refused in favor of filing this federal lawsuit, contrary to the requirement contained in the CBA. The Second Circuit's judicial voiding of the arbitration provision flouts repeated decisions from this Court that agreements to arbitrate statutory claims are enforceable "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.*, 473 U.S. at 628.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court already examined the text, legislative history, and purposes of the ADEA, and concluded that Congress did not intend to preclude arbitration of age discrimination claims. Since arbitration waives no substantive rights afforded by statute, but "only submits to their resolution in an arbitral, rather than a judicial, forum," *id.* at 26, *Gilmer* found that arbitration is entirely consistent with the statutory goals of the ADEA. Indeed, arbitration boasts numerous advantages over adjudication that this Court has recognized including "streamlined proceedings and expeditious results," *Preston v. Ferrer*, 128 S. Ct. 972, 986 (2008), and savings of litigation time and expense, *Circuit City*, 532 U.S. at 123. Most important, arbitration allows for full vindication of statutory rights. The arbitrator in this case was authorized to apply governing law and to grant any remedy otherwise available to Respondents to remedy any violations of the ADEA or other statutes which had occurred in connection with their employment.

Nothing in this analysis changes because this agreement to arbitrate arose out of the collective bargaining process. It is a fundamental premise of labor law that a union has the power to negotiate agreements with the employer as to virtually every aspect of its members' employment – from wages and hours to methods of dispute resolution – and that those agreements are binding on the employees as if they negotiated them themselves. 29 U.S.C. § 159(a). That an employee has a statutory discrimination theory as well as a contract theory for seeking recovery does not alter the union's bargaining authority. It is appropriate for a union to bargain collectively over the method of resolving such claims in exchange for valuable concessions, as occurred here. The Second Circuit's categorical ban not only cuts against the national policy favoring informal resolution of workplace disputes, but also undermines the role of the union in negotiating on behalf of its members.

In any event, there is no evidence that Congress ever distinguished between promises to arbitrate statutory discrimination claims based on whether the promises were individually made or collectively bargained. The Second Circuit's distinction creates perverse results. Arbitral arrangements are much more likely to be advantageous to employees when they are collectively bargained. If unions cannot make such promises, then under established labor law such a term of employment would become a non-mandatory subject of bargaining, imposable by the employer on employees, simply bypassing the union. *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 485 (D.C. Cir. 1999). Congress has not said, and could not have intended, that courts would compel arbitration as to individual employees, as in *Gilmer*, but not when the arbitral promise was bargained for collectively.

In the face of these decisions, the Second Circuit's reliance on *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), cannot be sustained. Contrary to the Second Circuit's view, *Gardner-Denver* decided nothing about whether clear collectively bargained promises to arbitrate statutory discrimination claims are categorically unenforceable. *Gardner-Denver* held only that an arbitrator's resolution of a contractual claim is not preclusive of a statutory claim under Title VII where the parties had not expressly agreed to arbitrate the statutory claim, and the arbitrator had no power to decide it. It did not address whether Congress had intended to preclude employers from invoking the FAA to compel arbitration where, as here, the employees' union had clearly agreed on behalf of its members that all their statutory discrimination claims would be arbitrated, with the arbitrators applying appropriate law and remedies. For that reason, *Gardner-Denver* is simply not on point.

The remaining grounds sometimes argued for distinguishing *Gilmer* when collectively bargained promises to arbitrate are concerned are equally unpersuasive. Collective bargaining agreements may waive individual rights if they expressly so provide. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 706-07 (1983). Speculative risks that statutory goals may be disserved (*e.g.*, the risk that a union might subordinate the employee's interest in his or her own claim to the union's interests) are insufficient as a matter of law to defeat a motion to compel under the FAA. *See Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79, 90-92 (2000). Moreover, they are unavailing here as a matter of fact, because Respondents' Union agreed that an arbitral forum was available to them. Structural protections, including suits for breach of the duty of fair representation, provide more than adequate assurance that enforcement of collectively bargained promises to arbitrate statutory discrimination claims will vindicate, and not betray, the substantive protection that Congress guaranteed.

ARGUMENT

I. A COLLECTIVELY-BARGAINED AGREEMENT TO ARBITRATE AN EMPLOYEE'S ADEA CLAIM IS ENFORCEABLE UNDER THE FAA.

A. Under the FAA, Agreements to Arbitrate Employment-Related Statutory Claims Are Enforceable.

Congress enacted the FAA more than eighty years ago "to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 n.14 (1985). The FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *see also Hall St. Assocs. LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1401-02 (2008) (same). Under the FAA, a contract to arbitrate any controversy arising out of a transaction involving commerce is "valid, irrevocable, and enforceable," except where grounds exist for the revocation of any contract. 9 U.S.C. § 2.

This Court has read the FAA to require "judicial enforcement of a wide range of written arbitration agreements," interpreting it "as implementing Congress' intent 'to exercise [its] commerce power to the full.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)). *See also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (reading these provisions to manifest "a liberal federal policy favoring arbitration agreements"). In particular, the FAA applies to employment contracts that contain arbitration provisions. *Circuit City Stores*, 532 U.S. at 109.

It has long been settled law under the FAA that arbitration agreements are enforceable as to statutory claims. *See, e.g., Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (enforcing agreement to arbitrate claims under the Truth in Lending Act); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act). This Court has rejected the notion that enforcing arbitration agreements to resolve statutory claims would somehow weaken the protections of substantive law.

The Court has identified only two circumstances in which agreements to arbitrate statutory claims are not enforceable under the FAA. First, such agreements are enforceable "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26. Second, arbitral promises are unenforceable if plaintiff can show that it will not be possible to "effectively . . . vindicate [his or her] statutory cause of action in the arbitral forum.'" *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi,* 473 U.S. at 637). The party opposing arbitration has the burden, and "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Green Tree Fin.*, 531 U.S. at 91-92 (citations omitted); *Gilmer*, 520 U.S. at 26.

The logic behind these decisions is that an agreement to arbitrate waives no substantive rights afforded by the statute but "only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628); *Preston*, 128 S. Ct. at 987 (same). Whatever protections a particular statute grants, the FAA establishes the presumption — unless shown to be otherwise — that Congress expected arbitration to provide an equally effective way to vindicate those interests. The fact that "statutorily protected classes" are involved "provides no reason to color the lens through which the arbitration clause is read." *Mitsubishi*, 473 U.S. at 628.

Applying these rules in *Gilmer,* this Court affirmed a judgment compelling arbitration of an employment discrimination claim under the ADEA. The case involved an employee who had signed a U-4 securities agreement — a mandatory unnegotiated condition of his securities industry employment, required by his employer and the New York Stock Exchange — providing for arbitration of any claim arising out of his employment. The Court held that the arbitration agreement would be enforceable unless Congress specifically intended to preclude use of an arbitral forum for ADEA claims. The Court noted that "[i]f such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes." *Gilmer*, 500 U.S. at 26.

The *Gilmer* Court found nothing to indicate any such congressional intention, and concluded that the plaintiff had therefore not carried his burden. To begin with, neither the text of the ADEA nor its legislative history revealed any congressional opposition to arbitration. Nor did *Gilmer* find any "inherent conflict" between arbitration and the ADEA's underlying purposes. Arbitration does not undermine the role of the EEOC in enforcing the ADEA. *Id.* at 28. Arbitration also does not deprive claimants of a judicial forum explicitly guaranteed by statute, because the ADEA does not mandate the use of any particular forum or even express a preference for judicial over arbitral forums. *Id.* at 29.

The Court also denied a variety of challenges to the adequacy of arbitration procedures:

> [I]n our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants . . . ."

Gilmer, 520 U.S. at 30 (citation omitted) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

Gilmer rejected contentions that arbitration panels are generally biased, or that their discovery procedures are necessarily inadequate, or that arbitral decisions would somehow insulate discriminatory conduct from public knowledge or judicial review. Such arguments were held to be "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 500 U.S. at 30. Indeed, the Court emphasized, "[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 34.[8]

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[8] Following *Gilmer*, Congress endorsed the use of arbitration for discrimination claims, including under the ADEA. *See* Civil Rights Act of 1991, § 118.

Any doubt that the FAA should be enforced according to its terms was eliminated by *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), a case involving a motion to compel arbitration of state law discrimination claims. *Circuit City* reaffirmed that the FAA embodies a strong presumption in favor of arbitration of employment disputes except for those transportation employees excluded by the FAA, Section 1. The Court rejected the argument that the enforcement of arbitration agreements in the employment context "ignores the interest of the unrepresented employee[s]" and the "potential disparity in bargaining power between individual employees and large employers." 532 U.S. at 132-33. It reaffirmed the principle that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Id.* at 123.

B. Local 32BJ, as Respondents' Exclusive Bargaining Representative, Had the Authority to Agree on Their Behalf to Arbitration of Their ADEA Claims.

The agreement to arbitrate statutory discrimination claims contained in the CBA was negotiated and entered into by Respondents' exclusive bargaining representative, Local 32BJ, in exchange for valuable concessions from the employers in the context of collective bargaining. The Agreement was voted upon and ratified by Local 32BJ's members. Therefore, under well-established principles of labor law, it is binding on Respondents as if they had signed it themselves.

Local 32BJ is Respondents' exclusive representative for purposes of collective bargaining. Under Section 9(a) of the National Labor Relations Act, the Union's status means that it is the sole and exclusive bargaining agent for all employees in the unit, and the scope of its authority encompasses all matters relating to the terms and conditions of employment. 29 U.S.C. § 159(a); *Communications Workers of Am. v. Beck*, 487 U.S. 735, 739 (1988). Within that broad ambit, the Union can enter into agreements that are binding not only on itself and the employer, but also on all the employees in the unit it represents. *See J. I. Case Co. v. NLRB*, 321 U.S. 332, 338-39 (1944); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (individual employee bound by grievance procedure agreed to by union in collective bargaining agreement).

The method of resolving disputes between an employee and the employer is a core example of a "term or condition of employment" concerning which the union's agreement is binding on the union member. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) ("[A]rrangements for arbitration of disputes are a term or condition of employment and a mandatory subject of bargaining"). The process for resolving statutory discrimination claims is part and parcel of workplace dispute resolution, and an appropriate subject for bargaining by the union. Unions already have the power to negotiate an employee's wages, *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); waive the right to strike or engage in other concerted activity, *Mastro Plastics Corp. v. NLRB*, 350

U.S. 270 (1956) and *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970); and settle workplace disputes with the employer, *Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967). These substantive rights are no less important than an employee's ability to submit a claim to a judicial forum. As some lower courts have held, the method of dispute resolution is a "preeminent" term and condition of employment as to which unions are entitled to bargain. *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 217 (4th Cir. 2007) (Wilkinson, J.) (holding that if courts placed the resolution of civil rights claims beyond the reach of arbitration, it would "change the nature of collective bargaining over conditions of employment and . . . read judicial exceptions into the National Labor Relations Act").

This Court has already held that unions may waive individual statutory rights of their members — notably including statutory protections against discrimination. In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), the court considered whether a union could waive its members' rights to be free of discrimination on the basis of union membership, a right guaranteed under the National Labor Relations Act, 29 U.S.C. § 158(a)(3), in connection with union officials who were disciplined more severely than other union members because of a strike. The Court answered in the affirmative that such waivers were enforceable as long as they were "clear and unmistakable," 460 U.S. at 708 — the same standard the Court would later draw on and apply in *Wright* to determine whether union-negotiated agreements to arbitrate are clear enough to encompass statutory claims. 525 U.S. at 80. *Metropolitan Edison* specifically recognized that "a union could choose to bargain away this statutory protection [to be free of discrimination based on union membership] to secure gains it considers of more value to its members." 460 U.S. at 707.[9]

This case is easier than *Metropolitan Edison*. The Union's promise to arbitrate is a waiver not of a substantive right to be free from discrimination but only of a judicial forum for discrimination claims. Thus, the Union here was able to secure advantages in bargaining *without* its members giving up any "statutory protection" from discrimination. The one procedural right that the Union members bargained away has already been held not to affect their ability to secure relief, and for that very reason was held to be waivable. *Gilmer*, 500 U.S. at 28. Indeed, lower courts have gone even further, holding for example that collective bargaining agreements may waive individually held Constitutional rights. *See, e.g., Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807 (3d Cir. 1991) (en banc) (Alito, J.) (public sector collective bargaining agreement can provide sufficient consent for searches of individual employees), *cert. denied*, 504 U.S. 943 (1992).

Judicial enforcement of collectively bargained promises to arbitrate claims arising from workplace disputes plays a central role in maintaining labor peace and resolving such disagreements. *See Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 451

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[9] In a footnote, *Metropolitan Edison* distinguished *Gardner-Denver* on the ground that in the latter case arbitration was found to be inconsistent with the purposes of Title VII. 460 U.S. at 706 n. 11. As discussed below, *Gilmer* expressly rejected that position.

(1957) (holding arbitration agreements enforceable under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185). The pro-arbitration policy discerned and enforced in *Lincoln Mills* was further articulated in the *Steelworkers Trilogy,*[10] and has been reaffirmed in numerous cases, including *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643 (1986) (holding dispute under collective bargaining agreement presumed arbitrable); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (finding narrow scope of judicial review of arbitration decisions); and *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 407 (1976) (holding that the "driving force" behind the rule permitting injunctions when a strike concerns an arbitrable dispute "was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties"). Arbitration of disputes under collective bargaining agreements is "part and parcel of the collective bargaining process itself." *Warrior & Gulf Navigation Co.*, 363 U.S. at 578.[11]

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[10] *See United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) (role of courts limited to determining arbitrability); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (because of the "congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration . . . [d]oubts [regarding arbitrability] should be resolved in favor of coverage"); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.* 363 U.S. 593, 597-99 (1960) (arbitrator's award drawing its essence from the collective bargaining agreement must be enforced, even if the court would differ on merits).

For all these reasons, it was not only permissible, but entirely appropriate for Local 32BJ to agree in collective bargaining to consent to an exclusive arbitral forum for its members' employment discrimination claims. Arbitration of such disputes is consistent with and promotes the national policy favoring arbitration in the employment setting. Accordingly, the Union's agreement was binding on its members, including Respondents.

C. Far from Indicating Hostility to the Arbitration of ADEA Claims, Congress Has Recognized Distinct Advantages to the Arbitration Process.

Under this Court's FAA jurisprudence, the CBA's waiver of a judicial forum is presumptively enforceable unless Congress has indicated an intention to preclude arbitration. *McMahon*, 482 U.S. 227. As *Gilmer* held, Congress indicated no such intention under the ADEA. Furthermore, there is nothing in the ADEA's text or legislative history demonstrating that Congress distinguished between promises to arbitrate ADEA claims depending on whether individual employees agreed to them or they were agreed to in collective bargaining. Nor did Congress conclude – or is there any reason to find – that enforcing collectively bargained promises to arbitrate ADEA claims would result in ineffective vindication of ADEA rights as compared to judicial adjudication.

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[11] Although these cases arose under Section 301 of the LMRA rather than the FAA, this Court has looked to both statutes interchangeably in describing the broad federal policy favoring arbitration. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) ("the federal courts have often looked to the [FAA] for guidance in labor arbitration cases"); *Mitsubishi, supra*, 473 U.S. at 626 (citing *Steelworkers* decisions under LMRA in explaining the "federal substantive law of arbitrability" in FAA context).

To the contrary, in the FAA and Section 301, Congress sought to foster arbitration out of the recognition that the arbitral forum offers "real benefits" without abridging or diluting substantive rights. *Circuit City Inc.*, 532 U.S. at 122. At least three benefits are notable here.

First, arbitration secures the benefits of statutory rights with "streamlined proceedings and expeditious results." *Preston*, 128 S. Ct. at 986.[12] With respect to claims regarding workplace discrimination, this is as true (if not more true) in the unionized sector as in the non-union sector, because arbitration has been the preferred dispute resolution mechanism for many decades for unionized employees, and the parties to collective bargaining agreements and their professional, experienced arbitrators are well-accustomed to resolving disputes in the arbitral forum.

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[12] *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes In The Debate Over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559 (2001) (explaining that "[t]here seems little dispute that because arbitration proceedings tend to be informal (and quicker), they require less lawyer time and resources").

Arbitration is well-recognized as a quicker, less expensive and more efficient method of dispute resolution when compared with litigation — "a benefit that may be of particular importance in employment litigation . . . ." *Circuit City Inc.*, 532 U.S. at 123. Many employment discrimination claims never make it to court, much less to trial,[13] and if they do get to court there is no reason to think that claimants will be better off than in arbitration.[14] By contrast, arbitration provides employees who believe that they have been discriminated against with an opportunity to present their case to a neutral fact-finder and receive a more immediate decision and remedy, if appropriate — including reinstatement, a remedy more likely to be ordered before the employment relationship has been irreversibly destroyed. Arbitrations regarding the propriety of an employee's discharge are conducted promptly by these parties, so that aggrieved employees will not have to wait years for a lawsuit to be completed

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[13] *See, e.g.*, Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, 6 A.B.A. Conflict Mgmt., Section Litig. 1, 8-10 (2003), *available at* http://www.arb-forum.com/ rcontrol/ documents/Research StudiesandStatistics/2003Delikat Kleiner Conflict Management.pdf (only 3.8% of the employment discrimination claims filed in the Southern District of New York reach trial).

[14] *See* David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1578 (2005) (concluding from empirical research that arbitration is significantly faster and that there is no evidence that plaintiffs fare better in litigation).

— potentially without any source of income during that period — and to be afforded an appropriate remedy if their discrimination claims are meritorious.[15]

Second, pursuing claims in arbitration may be considerably less expensive for employees. The laws against discrimination do not entitle employees to appointed counsel in federal civil rights actions. Employees in the unionized sector may have the services of union counsel who will handle members' employment discrimination claims through the collective bargaining agreement's grievance/ arbitration process.

Local 32BJ members, who hold such positions as building cleaners, porters, and doorpersons, derive a substantial benefit from their union's negotiation of an arbitration clause in which union counsel may be available to try discrimination claims of bargaining unit members in an arbitral forum. To the extent that Local 32BJ's members cannot afford an attorney, the arbitration benefit provided by the Union will enable the assertion of employment discrimination claims that otherwise might not be brought.

Third, the conflict reduction goals underlying labor law are well-served by requiring enforcement of, rather than the creation of an exception to, the FAA. Because statutory claims are likely to be intertwined with contract claims derived from the collective bargaining agreement, requiring that all such claims be presented for resolution in one forum is efficient and consistent with the dispute resolution goals underlying the national labor laws.[16] Since *Gilmer*, arbitrators have developed extensive experience in resolving claims of discrimination under the discrimination statutes. Arbitration of discrimination claims is also likely to have the useful effect of reducing the size of a federal docket heavy with employment cases.[17]

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[15] Under the collectively-bargained Building Service 32BJ Health Fund, a discharged employee is generally entitled to continue his or her medical benefits without cost for six months after the discharge if such discharge is pending arbitration.

D. There Is No Legitimate Basis to Differentiate the Enforceability of Agreements to Arbitrate Statutory Discrimination Claims Based on Whether Consent Was Given Individually or Collectively.

Nothing in the text of either the FAA or the NLRA, or for that matter in the ADEA, justifies distinguishing the enforceability of explicit promises to arbitrate statutory anti-discrimination claims based on whether they were agreed to individually or collectively. The long and successful history of arbitration under collective bargaining agreements makes it highly unlikely that Congress – having required courts to enforce contractual promises to arbitrate discrimination claims when those promises are made in individual employee-employer agreements – forbade them from enforcing identical promises when secured by unions in collective bargaining agreements in exchange for other valuable consideration.

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[16] Arbitrator Pfeffer considered the same factual predicate in his CBA-based decision as was alleged or would have been testified to in support of Respondents' federal age discrimination lawsuit. *Compare* JA 3-9 *with* JA 49-53, 61-62.

[17] Over the past five years, employment discrimination cases have ranged from 5.2% to 8.1% of district court dockets. *See* Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 2007 Annual Report Of The Director, James C. Duff, Table C-2A, 148 (2007).

In any event, under the inquiry *Gilmer* requires, there is simply no legislative direction instructing courts to carve out from FAA enforcement collectively bargained arbitral promises. Nor is there any basis for concluding that, while *Gilmer*-compliant arbitral promises effectively vindicate the ADEA's policies, enforcing identical promises made by unions on behalf of their members would somehow be ineffective in vindicating ADEA rights.

It would be perverse, and contrary to longstanding federal labor policy, to make such distinctions. Non-unionized employees typically have little bargaining power when faced with employer-initiated arbitration clauses to shape the arbitral process, yet their arbitral promises are fully enforceable under *Gilmer* and *Circuit City*. By contrast, the participation of unions in negotiating the terms of an agreement to arbitrate should afford substantial assurance that any arbitral process agreed to would be fair, professional, even-handed, and sensitive to claims of minority groups.[18]

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[18] For example, the 1.9 million member Service Employees International Union, the largest property services and health care union in the nation, as well as the parent union of Local 32BJ, estimates that fifty-six percent of its members are women and that forty percent of its members are "people of color." *See* http://www.seiu.org/about/fast%5Ffacts (last viewed Apr. 29, 2008).

Circuit City holds that employees can agree, as a condition of employment, to a binding waiver of a judicial forum. It follows *a fortiori* that employees acting with the benefit of union representation in the collective bargaining context should be able to authorize their collective bargaining representative to agree to such a binding waiver on their behalf. As this Court noted in comparable circumstances, an inconsistent result with regard to the enforceability of an arbitration provision "makes little sense for similar claims, based on similar facts." *Rodriguez de Quijas*, 490 U.S. at 485.

Holding such agreements unenforceable, moreover, would have no practical effect except to cut unions out of the process. If a union cannot agree to waiving a judicial forum for statutory discrimination claims, then under well-established labor law such a term of employment would become a non-mandatory subject of bargaining, and could be imposed by the employer without union participation or interference. *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 485 (D.C. Cir. 1999) (if *Gardner-Denver* precludes collectively bargained for agreements to arbitrate discrimination claims, then employer may propose such clauses to each individual employee as a condition of employment). *See generally NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (distinguishing between mandatory and non-mandatory subjects of bargaining).

The anomalous result would be that a court would not enforce an arbitral promise in a collective bargaining agreement negotiated and agreed to by the union, and voted upon and ratified by the members, but would enforce the same provision if the same employer imposed it unilaterally as a condition of continued employment for the same employees. It is hard to imagine that Congress would have intended any such outcome, and in any event, the FAA, the NLRA and the ADEA do not offer any basis for concluding that it ever did.

II. NEITHER *GARDNER-DENVER* NOR ITS PROGENY JUSTIFIES THE REFUSAL TO ENFORCE COLLECTIVELY BARGAINED AGREEMENTS TO ARBITRATE STATUTORY DISCRIMINATION CLAIMS.

A. *Gardner-Denver* Is Inapposite Because It Concerned Only the Preclusive Effect of an Arbitral Decision of Contractual Claims, Not the Enforceability of a Clear Agreement to Arbitrate Statutory Claims.

The Second Circuit's view that *Alexander v. Gardner-Denver* categorically renders unenforceable collectively bargained agreements to arbitrate statutory discrimination claims fundamentally misreads that decision. By its plain language, *Gardner-Denver* decided only a narrow question of law: whether an employee's submission of his contractual claim to arbitration precluded him from bringing a later lawsuit to vindicate his statutory rights under Title VII. 415 U.S. at 8, 47. Nothing in that holding bears on the question presented here — whether, notwithstanding the FAA, courts must refuse to enforce collectively bargained clear agreements to arbitrate statutory discrimination claims. The Second Circuit erred in considering itself precluded by *Gardner-Denver* from compelling arbitration under a *Wright*-compliant promise to arbitrate.

The facts of *Gardner-Denver* make plain its inapplicability to this case. After Mr. Alexander was discharged from his job for allegedly producing too many defective parts, he filed a grievance with his union, raising contractual claims. The collective bargaining agreement between Alexander's union and his employer contained no promise to arbitrate statutory discrimination claims. 415 U.S. at 39-42. The arbitrator had no authority to resolve such claims, and sat solely as the "proctor of the bargain" without the power to invoke public laws. *Id.* at 53. After the arbitrator denied his grievance, Alexander filed suit in federal court, alleging that his discharge had violated Title VII.

This Court held, unsurprisingly, that there had been no waiver of Alexander's Title VII claims. As it noted, "mere resort to the arbitral forum to enforce contractual rights" cannot waive statutory rights if the statutory rights form no portion of the arbitration process. *Id.* at 52. Later cases explained the holding of *Gardner-Denver* in precisely this manner:

> [The *Gardner-Denver* line of cases] did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. *Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not*

> *authorized to resolve such claims, the arbitration . . . understandably was held not to preclude subsequent statutory actions.*

Gilmer, 500 U.S. at 35 (emphasis added).

"No holding can be broader than the facts before the court." *United States v. Stanley*, 483 U.S. 669, 680 (1987). *Gardner-Denver* held that an employee who is *not* subject to a clear contractual obligation to arbitrate statutory discrimination claims "does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII," *Wright*, 525 U.S. at 75. It held nothing about the enforceability of clear contractual agreements to arbitrate statutory discrimination claims. The *Gardner-Denver* Court was not presented with any such clear contractual agreement.

Nor do *Gardner-Denver*'s progeny expand its holding to this case. In *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981), the Court examined the Fair Labor Standards Act ("FLSA"), not the ADEA, and did *not* hold that collectively bargained agreements to arbitrate statutory claims are categorically unenforceable. The issue in *Barrentine* was not the enforceability of any such agreement, but whether a prior arbitration precluded a later FLSA action where the arbitration was conducted pursuant to an agreement that did not promise arbitration of FLSA claims and the arbitration did not in fact address or resolve the FLSA claim. *See Gilmer*, 520 U.S. at 35 (rejecting any reliance on *Barrentine* on the issue of whether promises to arbitrate are enforceable under the FAA). To the extent that *Barrentine* repeated some of *Gardner-Denver's* negative comments regarding arbitration, those views were conclusively rejected in *Gilmer.*

McDonald v. West Branch, 466 U.S. 284, 288-92 (1984), fits the same pattern as *Barrentine*, holding that an arbitration award did not have collateral estoppel or *res judicata* effect in a subsequent 42 U.S.C. § 1983 action. *See Gilmer*, 520 U.S. at 35. Again, to the extent that *McDonald* repeated *Gardner-Denver's* comments hostile to arbitration, *Gilmer* expressly rejected them as affording no basis for refusing to enforce an arbitral promise. Neither *Barrentine* nor *McDonald* arose on a motion to compel arbitration, and neither decision discussed the FAA or implicated any of its provisions.

Accordingly, reversal of the Second Circuit's decision below would not necessitate the overruling of *Gardner-Denver* or its progeny. Here, the CBA does contain an express agreement to arbitrate statutory claims, makes compliance with the discrimination statutes a term of the agreement, and vests the arbitrators with authority to decide statutory claims. Pet. App. 43a. Moreover, unlike *Gardner-Denver*, where the arbitrator "ha[d] no general authority to invoke public laws" and could not base decisions on statutory law, *Gardner-Denver*, 415 U.S. at 53, the CBA here directs the arbitrators to "apply appropriate law in rendering decisions based upon claims of discrimination," and provides a full panoply of "appropriate remedies." CBA §30, Pet. App. 45a, 48a. *Gardner-Denver's* holding does not bar enforcing the agreement to arbitrate in this case.

B. None of the Policy Arguments Addressed in *Gardner-Denver* Justifies the Refusal to Enforce the Arbitration Clause.

Not only is *Gardner-Denver*'s holding inapplicable here, but none of the policy arguments it addressed supports a conclusion that – under the circumstances of this case – enforcing the arbitral promise in the CBA would be inconsistent with the ADEA.

1. *Enforcing agreements to arbitrate does not waive substantive rights. Gardner-Denver* expressed the concern that "there can be no prospective waiver of an employee's rights under Title VII," 415 U.S. at 51, but *Gilmer* subsequently resolved that concern, holding that while the substantive guarantees of federal anti-discrimination law are not waivable, arbitration of (and hence waiver of a judicial forum regarding) statutory discrimination claims waives no substantive rights and is fully consistent with the framework and purposes of the law. *Compare Gilmer*, 500 U.S. at 26-30 *with Gardner-Denver*, 415 U.S. at 51-52. As *Circuit City* summarized the law, "The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *See also Preston*, 128 S. Ct. at 987.

Moreover, arbitration is consistent with Congress's embrace of a variety of means of enforcing the ADEA, not limited to adjudication. As *Gilmer* noted:

> The EEOC, for example, is directed to pursue "informal methods of conciliation, conference, and persuasion," 29 U.S.C. § 626(b), which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress. In addition, arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, *see* 29 U.S.C. § 626(c)(1) (allowing suits to be brought "in any court of competent jurisdiction"), because arbitration agreements, "like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise."

500 U.S. at 29 (citation omitted).

In dicta, relying solely on *Wilko v. Swan*, 346 U.S. 427 (1953), which this Court subsequently overruled in *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477 (1989), *Gardner-Denver* stated that Title VII rights "can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." 415 U.S. at 51. But *Wright* subsequently confirmed that collective bargaining agreements could address more than traditional contractual issues if the parties were clear in doing so, 525 U.S. at 79-80, and, as discussed above, *Gardner-Denver*'s holding did not reach beyond its facts, which concerned only the preclusive effects of arbitral contract-based decisions absent a clear agreement to arbitrate statutory claims and direction to arbitrators to apply statutory law. *Gilmer* specifically considered and rejected the idea that arbitration would prevent vindicating the Congressional interests underlying the ADEA or result in the waiver of non-waivable rights.

2. *Union control or sponsorship of the arbitral forum is not a basis for rejecting enforcement of a clear and unmistakable agreement to arbitrate statutory discrimination claims.* A footnote in *Gardner-Denver* expressed concern over "the union's exclusive control over the manner and extent to which an individual grievance is presented," noting that "[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." 415 U.S. at 58 n.19. The decision below echoed the same concern. Pet. App. 11a-12a. But that concern is no basis for disregarding the mandatory force of the FAA, for multiple reasons.

First, and dispositively as to this case, whatever the validity of that issue in other circumstances, these facts simply do not raise it, since Respondents were *not* deprived of an arbitral forum and it is undisputed that one remains available to them. Respondents had and still have the indisputable opportunity to comply with the promise to arbitrate by bringing their statutory claims to arbitration on their own, as the Union made clear. *See* 8, 10 & n. 3, *supra.* Notwithstanding the agreement to arbitrate and the employer's willingness to arbitrate, Respondents declined to do so. *Id.* The motion to compel was not denied because no arbitral forum was available, but even though one concededly was available.

The promise to arbitrate statutory claims in Section 30 was explicit and unqualified and made on behalf of all employees in the bargaining unit, including Respondents. The issue presented here is therefore whether collectively-bargained agreements to arbitrate statutory disputes are enforceable where plaintiffs have not shown either that an arbitral forum will be denied or that an available forum cannot effectively resolve ADEA claims in accordance with governing law. Because Respondents offered no "showing at all on the point," much less a showing of "the likelihood" that the ADEA's purposes could not be served, there was no basis for denying the motion to compel. *Green Tree Fin.*, 531 U.S. at 92.

Far from showing any likelihood that statutory rights could not be enforced, the employees here did nothing beyond pointing to *Gardner-Denver* and the Second Circuit's overreading of it – a wholly insufficient basis for departing from the FAA and not enforcing the promise to arbitrate all age discrimination claims made on the employees' behalf. *Cf. Republic Steel Corp. v. Maddox*, 379 U.S. 650, 659 (1965) (holding that employee's failure to utilize the grievance procedures provided by collective bargaining agreement precluded suit against employer for severance pay, and rejecting contention that the possibility that the grievance procedure might be ignored or ineffective justified failure to exhaust).

Second, while this case on its facts does not involve a situation where a union's contractual power to decide whether to arbitrate a claim, or its actual decision not to do so, might mean that no arbitral forum may be available, seeking to avoid a promise to arbitrate on the basis of the "risk" that arbitration may not happen or may not effectively vindicate ADEA rights runs afoul of the rule that a party seeking to avoid an arbitral promise cannot succeed by pointing to a "risk" that the arbitration will not adequately vindicate statutory rights.

> To invalidate the agreement on that basis [*i.e.*, on the basis of what *might* happen] would undermine the "liberal federal policy favoring arbitration agreements." It would also conflict with our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.

Green Tree Fin., 531 U.S. at 91 (quoting *Moses H. Cone Memorial Hospital*, 460 U.S. at 24). Pointing to a "risk" of what might happen "is too speculative to justify the invalidation of an arbitration agreement." *Id.*

Third, concern over union sponsorship and control proves too much. It is possible that the interests of the union may conflict with individual interests in some cases, but employees, acting through their lawfully designated unions, are nonetheless free to waive collective and individual rights, in part because multiple structural protections safeguard individual claims from collective harm.

The duty of fair representation protects the employees, and there is no reason to suppose it less adequate here than in other circumstances.[19] Because labor unions are themselves subject to the ADEA and other anti-discrimination statutes, a union's decision not to pursue a workers' employment discrimination claim, if motivated by discriminatory animus, could subject the union to liability.[20] In those cases where a union member may wish to challenge the fairness of the arbitration process, courts are empowered to determine whether the process was in fact fair, and whether the decision was rendered by a neutral unbiased adjudicator. *See Gilmer*, 500 U.S. at 30-31; *see also, e.g., Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002). And an agreement to arbitrate statutory discrimination claims by an employee does not waive the employee's right to file charges with the Equal Employment Opportunity Commission (EEOC) or parallel state or local agencies, or prohibit such agencies from commencing a lawsuit in response to the charge seeking individual relief for the employee. *See EEOC v. Waffle House*, 534 U.S. 279 (2002).[21]

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[19] An employee who believes the union acted unfairly (in not processing or improperly handling a discrimination claim) can bring a duty of fair representation claim against it. *See Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1988); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Respondents brought such a claim here, but then withdrew it with prejudice. Furthermore, if a union should fail in its duty to fairly represent its members, the employees may bring an action for breach of the collective bargaining agreement. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983). Such an action against the union and employer could provide the employees with complete relief for statutory claims where, as here, the collective bargaining agreement incorporates rights under applicable employment discrimination laws. *See, e.g., Seymour v Olin Corp.*, 666 F.2d 202, 211 (5th Cir. 1982) (in "hybrid" Section 301/duty of fair representation action, the court has the power to award the remedies available in an arbitration held pursuant to the contract's grievance-arbitration procedure – *i.e.*, reinstatement and backpay in case of alleged wrongful termination – as well as prospective equitable relief).

[20] *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987) (affirming liability for union's discriminatory refusal to

(Cont'd)

(Cont'd)

file grievable racial discrimination claims); *EEOC v. Shopmen's Local 832*, 112 F.3d 503, reported in full at 1997 U.S. App. LEXIS 9570 (2d Cir. Apr. 29, 1997) (award of over $100,000 to employee whose union would not pursue her discrimination claim); *Woods v. Graphic Commc'ns*, 925 F.2d 1195 (9th Cir. 1991) (union liable for violation of state anti-discrimination law and breach of duty of fair representation for failure to process plaintiff's grievances concerning racial harassment); *Farmer v. ARA Servs., Inc.*, 660 F.2d 1096 (6th Cir. 1981) (affirming union liability and award of backpay and compensatory damages, under Title VII and for breach of duty of fair representation, based upon, inter alia, the union's refusal to arbitrate plaintiff's claims).

[21] Similarly, the General Counsel of the National Labor Relations Board takes the position that an agreement to arbitrate statutory claims does not waive the right to file charges with the NLRB or prohibit the NLRB from initiating its own action. *See, e.g., In re Bentley's Luggage Corp.*, 1995 NLRB GCM LEXIS 92 (Aug. 21, 1995).

Fourth, the concern over conflict rests on outmoded assumptions that the interests of the majority will generally oppose potentially meritorious discrimination claims. That is not the reality of today's integrated workforce and diverse unions. *See n.* 18 *supra.* If anything, unions have an interest in ensuring that claims of discrimination are grieved and arbitrated to enhance their prestige with members and strengthen their stature as collective bargaining representatives. *See Republic Steel Corp.*, 379 U.S. at 653. Indeed, both the EEOC and courts recognize the right of unions to assert employment discrimination claims on behalf of their members. *See* EEOC Compliance Manual, Section 2-V (b), *available at* http://www.eeoc.gov/policy/ docs/ threshold.html (providing that a union "may file a charge on behalf of one of its constituents"); *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (affirming right of union to bring Title VII claim on behalf of its members), *cert. denied*, 512 U.S. 1228 (1994).

3. *Promises to arbitrate statutory claims in a collective bargaining agreement are no less voluntary than the arbitral promises enforceable under Gilmer.* A final concern mentioned in *Gardner-Denver* was that unionized employees cannot be said to have voluntarily waived a federal judicial forum when the arbitral promise is delivered by the union acting on the members' behalf. 415 U.S. at 58 n. 19. These concerns are, however, met by *Gilmer* and *Circuit City*, as well as by the union's role as exclusive bargaining representative under the NLRA. Further, arbitral provisions in union contracts are likely to be no less consistent with effective vindication of statutory anti-discrimination laws than *Gilmer*-compliant promises, because unionized

employees, through their elected representatives, have an opportunity to consent (or not) to a promise to arbitrate statutory discrimination claims, and to shape the arbitral forum and rules.[22] The individual union members have at least the same ability that non-union employees have to reject or consent to arbitration clauses, and a greater ability to shape them.

* * *

The question presented here concerns not claim preclusion, as in *Gardner-Denver*, but a motion to compel arbitration under the FAA pursuant to a clear and unmistakable promise that all statutory workplace discrimination claims would be subject solely and exclusively to arbitration. *Gardner-Denver* does not preclude compliance with the FAA according to its terms. *Gilmer*, *Wright* and *Metropolitan Edison*, read together, teach that promises to arbitrate such claims are generally enforceable, and offer no basis for distinguishing collectively bargained promises to arbitrate statutory discrimination claims from *Gilmer*-enforceable promises, so long as the promises are clear and unmistakable and not inconsistent with the purpose or intent of the legislation, as they are here.

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[22] *See, e.g.*, Robert A. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* (2d ed., 2004), at 507 ("Congress intended [in the National Labor Relations Act] to substitute the strength of the collectivity for the weakness of the individual bargainer").

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed, and the case remanded for entry of an order compelling arbitration.

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

14 PENN PLAZA LLC AND
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
AND MICHAEL PHILLIPS,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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July 14, 2008

QUESTION PRESENTED

Whether a provision in a collective bargaining agreement creating an arbitration process for the union and the employer precludes an employee from bringing a lawsuit alleging a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, when the union controls access to the arbitration and refuses to bring the employee's grievance in arbitration.

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INTRODUCTION

This case arises from an interlocutory appeal of a motion to compel arbitration. The collective bargaining agreement ("CBA") between petitioners and the union, the Service Employees International Union, Local 32BJ ("Local 32BJ"), creates an arbitration process for resolving disputes between petitioners and Local 32BJ. The arbitration provision does not give respondents any individual contractual right to invoke the arbitration provision. Although respondents requested that Local 32BJ arbitrate their statutory discrimination claims against petitioners, Local 32BJ refused to bring their claims to the arbitrator for resolution. In denying petitioners' motion to compel arbitration, both courts below followed *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and held that Local 32BJ could not prospectively waive respondents' litigation rights under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*

This Court should affirm the judgment below for either of two independent reasons. First, the Court has long held that arbitration under a collective bargaining agreement does not preclude an employee's assertion in litigation of individual statutory antidiscrimination claims. *See Gardner-Denver*, *supra*. The concerns that guided the Court in that unanimous decision – the union's control over the arbitration process and inherent conflicts of interest between the union's collective interests and the employee's individual rights – continue to dictate the same result. Union control over the process strips individual employees not only of their right to choose a forum, but also (as in this case) of their substantive rights guaranteed by statute. Those rationales gain special force in this particular statutory context, because Congress specified certain requirements in the ADEA before a waiver of statutory rights could be found. As a matter of law, the power of unions should not extend to waivers of individual, non-economic rights protected by statute.

Second, even if a union *could* waive a litigant's individual statutory rights to bring a discrimination lawsuit and force such claims to be brought in arbitration, this Court made clear in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), that any such waiver would be deemed contractually insufficient unless the reference to the statutory rights was clear and unmistakable; there would be no presumption of arbitrability. Although the CBA at issue in this case references the ADEA, it suffers from a different, yet related, type of contractual insufficiency: no provision in the CBA enables respondents to arbitrate under the agreement. The CBA provides that Local 32BJ decides whether to bring the claims and whether to compromise them, and Local 32BJ has rejected respondents' claims without bringing them to arbitration. Absent any arbitration right, there is no arbitration provision to support a motion to compel arbitration. On the facts of this case, therefore, even if Local 32BJ could have lawfully waived respondents' rights to pursue their individual statutory ADEA claims in court, it has not done so in this CBA.

STATEMENT

1. a. Congress enacted the ADEA more than 40 years ago to eradicate "arbitrary age discrimination in employment" and "to promote employment of older persons." 29 U.S.C. § 621(b). The statute prohibits employers and unions from discriminating against persons over the age of 40 with respect to any term, condition, or privilege of employment. *Id.* § 623.

The statute expressly provides individuals with overlapping remedies and various forums in which to obtain relief for their age discrimination claims. *Id.* § 626(b)-(d). Under the congressional scheme, an ADEA claimant first submits his claim to the state human rights organization, if one exists. *Id.* § 633(b). When the state proceedings terminate, the claimant may file a charge with the Equal Employment Opportunity Commission ("EEOC"). *Id.* § 626(d). The EEOC is authorized to investigate and attempt to conciliate charges of discrimination and to bring civil actions against employers or unions. *Id.* § 626(b). After any EEOC action has concluded, the individual may choose to proceed in federal or state court. *Id.* § 626(d)-(e). The individual is statutorily entitled to a trial by jury on his claims. *Id.* § 626(c)(2). Under the statute, any waiver of an individual's right to pursue a judicial remedy must be made by the affected individual and be "knowing and voluntary." *Id.* § 623(f).

b. The National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, and the Labor Management Relations Act, 1947 ("LMRA"), 29 U.S.C. § 141 *et seq.*, create a system for the resolution of "industrial disputes" via collective bargaining between unions and employers. *See id.* § 151. Congress passed the NLRA in 1935 to curtail strikes and "other forms of industrial strife or unrest," which were "burdening or obstructing commerce." *Id.* Increasing union power and strikes led Congress in 1947 to pass the LMRA, which amended parts of the NLRA and placed greater restrictions on the activities of unions. *See* Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 Stan. L. Rev. 1123, 1127 (1986). The goal of both statutes was to provide for industrial self-governance by unions and employers. As Congress explained in enacting the NLRA:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151. Under the NLRA, as amended by the LMRA, workers give up their right to bargain individually over their wages and working conditions to unions in exchange for the benefit of "organiz[ing] and bargain[ing] collectively" through "[r]epresentatives designated or selected . . . by the majority of the employees in a unit." *Id.* §§ 151, 159(a). Unions' bargaining power under the statute, however, does not extend beyond workers' economic interests. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983) ("a union may bargain away its members' economic rights"); 20 *Williston on Contracts* § 55:30, at

121 (4th ed. 2001) ("A distinction has been drawn between a union having the power to waive statutory rights related to collective activity, but not statutory rights that are of a personal, and not merely economic, nature."). In fashioning that system, Congress provided for unions to exercise majority rule on behalf of all employees, but provided no statutory guarantee that a union would act in any individual worker's best interests.

2. a. In July 2003, respondents Steven Pyett and Thomas O'Connell were employed by Temco Service Industries, Inc. as night watchmen in a commercial office building in New York City owned by Pennsylvania Building and 14 Penn Plaza LLC (together, with Temco, "petitioners"). *See* JA2-4. Respondent Michael Phillips was employed by petitioners as a night starter in that same building. *See* JA4-5. At that time, respondents were the only building employees over 50 years old. *See* JA3-5.

In August 2003, petitioners hired Spartan Security, an affiliate of Temco that contracts for security services, to provide security personnel for the office building. *See* JA6. Local 32BJ consented to petitioners' use of Spartan as a subcontractor. *See* Pet. App. 4a. Spartan brought in new employees, displacing respondents from their positions and replacing them with much younger workers. As a result, respondents were reassigned to less desirable positions. *See* JA6-8. Specifically, Pyett and O'Connell were reassigned from the position of night watchman to that of night porter, and Phillips was reassigned from a night starter to a light duty cleaner. *See id.* Those reassignments forced respondents to engage in greater physical activities than their health permitted, as well as resulted in a diminution in prestige in their employment positions. *See* JA82, 89, 94-95. As pleaded in the complaint, respondents' reassignments also led them to be denied overtime and to suffer a substantial loss of income and emotional distress. *See* JA10-11.

As members of Local 32BJ, respondents were covered by the collective bargaining agreement ("CBA") between Local 32BJ and petitioners as members of the Realty Advisory Board on Labor Relations ("RAB"). *See* CA App. A160-61. The "parties" to the CBA are Local 32BJ and petitioners. The CBA consists primarily of provisions applying to the parties to the agreement. Certain terms of the CBA expressly apply to the employees represented by Local 32BJ and provide that these employees agree to be bound by its terms.[1]

Among the CBA's "general provisions" is a section prohibiting "discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to . . . the [ADEA]" and state age discrimination laws in New York, New Jersey, and Connecticut. *See id.* at A207-08 (CBA Art. XIV ¶ 30). The CBA also provides that "[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." *Id.* at A208.

According to Local 32BJ, which describes the negotiating history of the CBA in its *amicus* brief (at 10-14), in 2000 the RAB made the following proposal for language to be included in the 2000 Apartment

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[1] *See, e.g.*, CA App. A176-82 (specifying minimum hourly wage), A183-85 (delineating working hours and overtime), A190-91 (specifying holidays).

Building Agreement between the RAB and the Union:

> "No Discrimination:
>
> "(a) Amend Article XVII, Section 23 [no discrimination clause] to conform to the language of the 1999 Commercial Agreement.
>
> "(b) Add fourth paragraph to Article IV [the management rights clause] indicating that nothing in this Agreement shall be construed to prevent the Employer from requiring, as a condition of employment, that employees are required to submit all claims of discrimination in employment to the Arbitration process under this Agreement."

See Local 32BJ Br. 11 (brackets in original). As Local 32BJ explains, it agreed to paragraph (a) of the RAB proposal, but specifically rejected paragraph (b)'s provision that would allow employers such as petitioners to insist, as a condition of employment, "that employees are required to submit all claims of discrimination in employment to the Arbitration process under this Agreement." *See id.* at 11-12. The RAB subsequently withdrew that proposal and did not seek to include that provision in any subsequent negotiations over the CBAs for commercial buildings and cleaning contracting members, including the CBA at issue in this case or its precursors. *See id.* at 14. Thus, the CBA applicable here does not contain the particularized provision permitting the employer to require employees to submit their claims for discrimination to arbitration. As a consequence, none of the respondents has entered into an agreement consenting to binding arbitration of their statutory discrimination claims.

In contrast, the CBA in this case creates binding procedures for resolving disputes between Local 32BJ and petitioners. *See* CA App. A167-69 (CBA Art. VI). Under those procedures, "[a]ll Union claims are brought by the Union alone, and no individual shall have the right to compromise or settle any claim without the written permission of the Union." *Id.* at A168 (¶ 7). Further, Local 32BJ can appear at the arbitration without the grievant, and the arbitrator has the power to "decide the case based upon the evidence at the hearing." *Id.*

The CBA outlines the selection and compensation of arbitrators. Pursuant to the agreement, arbitrators employed by the Office of the Contract Arbitrator-Building Service Industry serve as contract arbitrators for all arbitrations brought under the agreement. *See id.* at A168-69. The costs of contract arbitration, including the fee of the arbitrator and counsel fees, "shall be borne fifty percent (50%) by the Employer and fifty percent (50%) by the Union" (except in limited circumstances when the employer must bear all costs). *Id.* at A167 (¶ 2).

The CBA further provides that, "[u]pon thirty (30) days written notice to each other, either the Union or the RAB may terminate the services of any Arbitrator on the panel." *Id.* at A169 (¶ 7). "Successor or additional Arbitrators shall be appointed by mutual agreement of the Union and the RAB." *Id.* If the parties – i.e., Local 32BJ and the RAB – are unable to agree on a successor arbitrator, "then the Chairman of the New York State Employment Relations Board shall appoint a successor after consultation with the parties." *Id.* The CBA requires that the costs of the Office of the Contractor Arbitrator be borne equally by Local 32BJ and the RAB. *See id.* The CBA nowhere empowers any individual employee with the authority to engage in the selection of an arbitrator or otherwise to participate in the process of selecting arbitrators in the Office of the Contract Arbitrator.

Pursuant to those procedures, in August 2003 Local 32BJ filed a grievance on behalf of respondents alleging that respondents' reassignments violated the terms of the CBA. Initially, Local 32BJ's grievance alleged, among other claims, that petitioners had violated the provision of the CBA prohibiting discrimination against employees on the basis of their age. *See* JA8. After exhausting the preliminary steps of the grievance procedure,[2] Local 32BJ submitted respondents' claims, including age discrimination, to arbitration. By letter dated February 23, 2004, however, Local 32BJ subsequently reversed that position, decided not to pursue respondents' age discrimination claims, and withdrew the claims from the pending arbitration. *See* JA8, 99.[3]

b. Thereafter, in May 2004, respondents filed complaints of age discrimination against petitioners with the New York District Office of the EEOC. *See* JA9. Respondents alleged that they were wrongly transferred and denied overtime on the basis of their age, in violation of the antidiscrimination provisions of the ADEA, the New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq.*, and the New

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[2] Under the CBA, before an arbitration commences, Local 32BJ and petitioners are required "[t]o endeavor to adjust without arbitration any issue between the parties which under this Agreement the parties are obligated to submit to the Arbitrator." CA App. A166 (CBA Art. V ¶ 1(b)). If this grievance procedure fails to achieve a resolution, the claim is submitted to arbitration.

[3] On August 10, 2005, respondents' remaining claims were denied by the arbitrator. *See* JA49-66.

York City Administrative Code, N.Y.C. Admin. Code § 8-107. Between June 2004 and August 2004, the EEOC issued right-to-sue letters to all three respondents. *See* JA9.

In September 2004, respondents re-filed their claims in the United States District Court for the Southern District of New York. Five months later, in February 2005, petitioners offered to provide an alternative arbitral forum for respondents to arbitrate their ADEA claims with petitioners, using the same arbitrators specified under the CBA. *See* Pet. Br. 8. Local 32BJ consented to use of the Office of the Contract Arbitrator "as the forum for [respondents'] private attorney to pursue [respondents'] statutory age discrimination claims, as long as the parties to this lawsuit, and not the Union, pay the costs associated with the arbitration." Pet. App. 42a. Petitioners moved in the district court to dismiss the action for failure to state a claim and, in the alternative, to compel arbitration pursuant to 9 U.S.C. §§ 3 and 4. *See id.* at 5a. The district court denied both motions. With respect to the motion to compel arbitration, the district court relied principally on its recent case of *Granados v. Harvard Maintenance, Inc.*, No. 05 Civ. 5489 (NRB), 2006 WL 435731, at *4-*6 (S.D.N.Y. Feb. 22, 2006), which in turn relied on the Second Circuit's holdings in *Fayer v. Town of Middlebury*, 258 F.3d 117 (2d Cir. 2001), and *Rogers v. New York University*, 220 F.3d 73 (2d Cir. 2000). In those cases, the Second Circuit reaffirmed that, under this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable," Pet. App. 21a, and it rejected the contention that *Gardner-Denver* had been overruled by *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998).

c. Petitioners brought an interlocutory appeal of the district court's denial of their motion to compel arbitration. The court of appeals affirmed the district court's decision and rejected petitioners' request to enforce the arbitration clauses in the CBA against respondents. *See* Pet. App. 8a-11a. In so ruling, the court reaffirmed its holdings in *Fayer* and *Rogers*. In *Rogers*, the Second Circuit had concluded that *Gardner-Denver*, not *Gilmer*, applies to collective bargaining agreements and that, under *Gardner-Denver*, arbitration provisions in collective bargaining agreements "by which employees purport to waive their right to a federal forum with respect to statutory claims" are not enforceable. 220 F.3d at 75. The court below deemed its precedent to rest solidly on this Court's decisions in upholding two important propositions. The first is that *Gardner-Denver* "still governed arbitration provisions in CBAs, notwithstanding the Supreme Court's holding in *Gilmer* that an employee who agreed to waive his individual right to a federal forum could be compelled to arbitrate an age discrimination claim." Pet. App. 8a (citing *Rogers*). The second is that "the language of the waiver" must be "'clear and unmistakable'" in applying to parties to the agreement. *Id.* at 8a-9a (quoting *Wright*, 525 U.S. at 80). The court then concluded that "[n]one of the other Supreme Court cases on which [petitioners] rely casts doubt on our holding in *Rogers*." *Id.* at 10a (citing *Metropolitan Edison*; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)).

SUMMARY OF ARGUMENT

This Court has repeatedly held that a union-controlled arbitration does not preclude an individual employee from pursuing his statutory antidiscrimination claims in court. These decisions properly recognize that, in a union-controlled arbitration process, an employee is unable to vindicate his individual, substantive statutory antidiscrimination rights.

This Court's holding in *Alexander v. Gardner-Denver-Co.*, 415 U.S. 36 (1974), that a union cannot waive an employee's right to a judicial forum under the federal antidiscrimination statutes, applies directly to this case. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court reiterated the concern expressed in *Gardner-Denver* that allowing the union to waive this right would substitute the union's interests for the employee's antidiscrimination rights.

These decisions are consistent with the limited legal powers conferred on unions by federal statute. Although a union is authorized to waive employees' collective rights in order to further self-governance between the employer and the union, the union's waiver authority does not extend to employees' individual, non-economic rights under the federal antidiscrimination statutes. A union is obligated to further the collective interest of its bargaining unit, and this obligation necessarily takes precedence over, and often conflicts with, the individual interests and rights of its employees. Because the federal antidiscrimination statutes protect "not majoritarian processes, but an individual's right to equal employment opportunities," *Gardner-Denver*, 415 U.S. at 51, the vindication of that right can only be committed to arbitration by the aggrieved individual, and not by the union in a collective bargaining agreement. Moreover, labor arbitration's focus on the "law of the shop" is ill-suited to resolve statutory discrimination claims.

The ADEA's express requirement that any waiver of an employee's right to litigate be made by the affected individual, *see* 29 U.S.C. § 626(f)(1), precludes the union from waiving an employee's ADEA rights. Because the rights afforded under the ADEA and other antidiscrimination statutes are important public rights that devolve on employees as individuals, not as members of a collective bargaining unit, the union cannot deprive employees of their ability to vindicate those rights individually and in court, with the right to a jury trial, through a collective bargaining agreement. Allowing union waiver would subjugate employees' antidiscrimination rights to the collective interest of the union. The potential for the employee to establish a duty-of-fair-representation claim is a poor substitute for the rights and remedies available to that employee under federal antidiscrimination law.

Assuming that it were somehow legally possible for a union to waive an individual's right to pursue a judicial forum for his or her ADEA claims, arbitration could not be compelled in this case because the respondents cannot "effectively . . . vindicate" their rights in arbitration under the CBA. *Gilmer*, 500 U.S. at 28. Petitioners seek to compel respondents to arbitrate with them, but such arbitration is not provided for in the CBA at issue in this case. Respondents have no right to invoke the CBA's arbitration provision and no power to exercise any control over a CBA arbitration. Thus, there is no arbitral forum to compel under the CBA.

ARGUMENT

I. AN ARBITRATION PROVISION IN A COLLECTIVE BARGAINING AGREEMENT CANNOT PRECLUDE AN EMPLOYEE FROM PURSUING A JUDICIAL REMEDY UNDER A FEDERAL ANTIDISCRIMINATION STATUTE

A. *Gardner-Denver* Held That A Union-Controlled Arbitration Does Not Preclude An Individual Employee From Litigating A Statutory Antidiscrimination Claim

1. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court unanimously held that the existence of an arbitration provision in a collective bargaining agreement does not obviate the right of individual employees to litigate claims under federal antidiscrimination law:

> [T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under [federal antidiscrimination law].

Id. at 59-60. That holding controls this case.

In *Gardner-Denver*, this Court confronted facts analogous to those at issue here. Both cases involved employees who suffered adverse employment actions that they alleged constituted discrimination in violation of a federal antidiscrimination statute. The employees were each covered by a collective bargaining agreement between the union and the employer that contained an arbitration provision that could be invoked by the union. The employees did not consent to the agreement, nor did they have any control over arbitration under the agreement. In both cases, the union arbitrated (at least some of) the employees' claims. This Court's unanimous conclusion in *Gardner-Denver* that an arbitration provision in a collective bargaining agreement does not preclude an employee from litigating his discrimination claims applies with equal force here.

The *Gardner-Denver* Court rested its holding in part on the inadequacy of the labor arbitration process in resolving an individual employee's statutory discrimination claims. *Id.* at 57-58. As the Court explained, "[a] further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented." *Id.* at 58 n.19. The Court also reasoned that, in a union-controlled arbitration process brought pursuant to a collective bargaining agreement, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Id.* "[H]armony of interest between the union and the individual employee cannot always be presumed, especially where" a claim of "discrimination is made." *Id.* That combination of union control over the process and inherent conflict of interest with respect to discrimination claims provided the foundation for the Court's holding that arbitration under a collective bargaining agreement could not preclude an individual employee's right to bring a lawsuit in court to vindicate a statutory discrimination claim.

2. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court expressly relied on the union's control over the arbitration process in distinguishing between a waiver of litigation through a contractual arbitration clause in an individual's agreement and a purported waiver in a collective bargaining agreement. The *Gilmer* Court relied on *Gardner-Denver* for the proposition that "in collective-bargaining arbitration 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.'" *Id.* at 34 (quoting *Gardner-Denver*, 415 U.S. at 58 n.19). As the *Gilmer* Court elaborated, the "arbitration in [the *Gardner-Denver* line of] cases occurred in the context of a collective-bargaining agreement," with the claimants "represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable" in *Gilmer*. *Id.* at 35.

In *Gilmer*, in stark contrast to both *Gardner-Denver* and this case, the issue was whether an arbitration agreement knowingly and voluntarily consented to by a sophisticated person in an individual employment contract could bar that employee from later seeking judicial relief of his statutory ADEA claims. The plaintiff in *Gilmer* was a representative at a securities firm, not represented by a union. He signed a New York Stock Exchange registration agreement that contained an express arbitration provision covering "[a]ny controversy . . . arising out of [his] employment or termination." *See id.* at 23 (first alteration in original). Subsequently, he was terminated and sought to proceed in court on a claim that his termination violated the ADEA. This Court held that the employee had waived his right to litigate his discrimination claims by entering into the arbitration agreement. *See id.* at 35.

The legal context in *Gilmer* is completely different from that presented here. *Gilmer* did not involve a collective bargaining agreement; it involved a contract between the employee and the employer under which the employee could arbitrate his claims. The *Gilmer* Court explicitly distinguished *Gardner-Denver* on precisely such grounds, including "the potential disparity in interests between a union and an employee." *Id.* The Court explained that "[a]n important concern [motivating the decision in *Gardner-Denver*] was the tension between collective representation and individual statutory rights," which was a concern not applicable in the *Gilmer* case. *Id.* Recognition of the conflict between the union's interests and the employee's was key to the *Gardner-Denver* decision because allowing the union to waive an employee's right to a judicial forum would substitute the interests of the union for those of the employee.

The *Gilmer* Court devoted an entire section of its opinion to explaining why *Gardner-Denver* was distinguishable – distinctions that underscore why this case is properly governed by *Gardner-Denver*, not *Gilmer*. *See* 500 U.S. at 33-35. Union control over the forum, therefore, is a principle recognized in both *Gardner-Denver* and *Gilmer* as a reason to distinguish between waiver of individual statutory rights in the collective bargaining context, which is not permissible, and an agreement to arbitrate statutory claims in the individual contract context, which is permissible.

3. Not long after *Gilmer*, the Court again recognized the distinction between an individual's ability to waive his litigation rights through an arbitration agreement and the power of a union to waive employees' litigation rights in a collective bargaining agreement in which the union retains control of the employees' access to arbitration. In *Livadas v. Bradshaw,* 512 U.S. 107 (1994), the Court distinguished *Gilmer* from *Gardner-Denver* on the ground that collective bargaining arbitration may lead to the subordination of the individual employee's rights to those of the "'collective interests of all employees in the bargaining unit.'" *Id.* at 127 n.21 (quoting *Gardner-Denver*, 415 U.S. at 58 n.19). The *Livadas* Court stressed that "*Gilmer* emphasized its basic consistency with our unanimous decision" in *Gardner-Denver. Id.* Accordingly, in *Livadas*, the Court relied in part on *Gardner-Denver* in rejecting the argument that employees would be held to the "benefit of their bargain" in a collective bargaining agreement to arbitrate a claim under 42 U.S.C. § 1983 that an administrative interpretation of a state law improperly denied them payment of wages and benefits upon the termination of their employment. *Id.* at 127-28.

Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998), confirms the continued vitality of *Gardner-Denver* and its underlying principles.[4] In *Wright*, this Court noted that *Gardner-Denver* held that "an employee does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964 if 'he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.'" *Id.* at 75-76 (quoting *Gardner-Denver*, 415 U.S. at 49) (citation omitted). Although the Court recognized that arguments had been made suggesting tension between *Gardner-Denver* and the holding in *Gilmer* that an *individual* employee can waive a right to pursue a statutory age discrimination claim in court under an arbitration clause, the Court had no occasion to disturb *Gardner-Denver* as valid precedent. *Id.* at 76-77.[5] Instead, this Court declined to apply a presumption of arbitrability to collective bargaining agreements purporting to waive individual statutory litigation rights and held that any attempt to waive individual statutory litigation rights in a collective bargaining agreement must be clear and unmistakable. On the facts presented, the Court concluded that a general arbitration clause in a collective bargaining agreement did not waive an employee's right to bring a claim under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* The Court deemed general language that the parties intended that "no provision or part of this Agreement shall be violative of any Federal or State Law" to be insufficiently clear to provide for the prospective waiver of an ADA claim. *See* 525 U.S. at 73, 80-82. Finally, the Court emphasized that it was not deciding whether such a waiver, even if clear and unmistakable, would be enforceable. *See id.* at 77.

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[4] Just last Term, the Court quoted *Gardner-Denver*'s holding that "'legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination.'" *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (quoting *Gardner-Denver*, 415 U.S. at 47).

Stare decisis dictates that this Court adhere to its longstanding precedent and reaffirm the continuing validity of *Gardner-Denver* in this case. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). Congress has been free to amend the NLRA or the federal antidiscrimination statutes if it disapproved of the *Gardner-Denver* rule and wished to give unions the authority to waive individual statutory rights, but it has not done so. "*[S]tare decisis* in respect to statutory interpretation has 'special force,'" because "'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 756 (2008) (quoting *Patterson*, 491 U.S. at 172-73). *See also, e.g., CBOCS West*, 128 S. Ct. at 1961 ("Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.").

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[5] In Part II, *infra* pp. 41-46, we explain why, like *Wright*, this case also does not involve a valid union waiver of an employee's rights to pursue litigation of an ADEA claim.

B. Collective Bargaining Agreements Are Quintessentially Majoritarian Contracts That Are Not Designed To Divest Employees Of The Right To Bring Individual Discrimination Claims

Even if this Court were to re-examine the principles underlying *Gardner-Denver* anew, the core holding of that case still rests on a solid statutory and doctrinal footing. Because of the limited legal powers conferred on unions by statute and the overriding concern that majoritarian impulses may thwart individual rights, a union-based arbitration of an employee's antidiscrimination rights does not preclude that employee from bringing an ADEA suit in court.

1. A union has only limited powers to bargain over collective rights and may not prospectively waive a worker's individual, non-economic rights

A foundational principle undergirding the *Gardner-Denver* rule is that a union generally does not have the power to force arbitration of employees' individual rights. A union is authorized in the circumstances set out in federal statutes to waive employees' *collective* and economic rights under the NLRA and the LMRA as the exclusive agent on behalf of employees in contractual negotiations with the employer. But this Court's cases hold that those authorizations do not extend to employees' individual, non-economic rights, such as those under the federal antidiscrimination statutes.[6]

In the course of "reach[ing] an agreement as to wages and other employment benefits," the union can bargain away employees' rights "in the economic area" as a "*quid pro quo*" for more favorable wages, hours, or other terms and conditions of employment. *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974). For instance, a union may waive an employee's contractual right under the NLRA "to strike during the contract term, and his right to refuse to cross a lawful picket line." *NLRB v. Allis-Chalmers Mfg.*

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[6] Employers may be free to bargain with individual employees, rather than the union, with respect to an arbitration clause. The D.C. Circuit recently rejected a union's claim that the employer could not lawfully require trainees to consent to the arbitration requirement without first bargaining with the union. *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999) ("We see a clear rule of law emerging from *Gardner-Denver* and *Gilmer*: Unless the Congress has precluded his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him."), *aff'd on reh'g en banc*, 211 F.3d 1312 (D.C. Cir. 2000) (per curiam). In this case, when Local 32BJ rejected the RAB's proposal to include a provision under which the employer could require individual employees to submit to arbitration as a condition of employment, the RAB backed down and no such provision was included in the CBA at issue here. *See supra* pp. 6-7.

Co., 388 U.S. 175, 180 (1967) (footnote omitted). Such "rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members." *Gardner-Denver*, 415 U.S. at 52. Likewise, a union may require its officials to take affirmative steps to end unlawful work stoppages.[7]

The union lacks the authority, however, to waive employees' individual, non-economic statutory rights, including their rights under federal antidiscrimination statutes. *See Gardner-Denver*, 415 U.S. at 52; *see also Magnavox*, 415 U.S. at 327 (Stewart, J., concurring in part and dissenting in part) ("[The union's waiver] authority cannot extend to rights with respect to which the union and the individual employees have essentially conflicting interests."). As this Court stated in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), the "rights petitioners seek to assert in [a statutory] action are independent of the collective-bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization. They are not waivable." *Id.* at 745.

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[7] Petitioners cite (at 23) *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), for the proposition that the union can waive an employee's right to be free from discrimination. But that case involved differential sanctions in response to an unauthorized work stoppage depending on union leadership status, which the Court equated with economic rights protected by the NLRA, not individual rights protected under antidiscrimination statutes. Moreover, even in a case involving union waiver of economic rights derived from labor protection statutes, the Court made clear that a waiver of individual rights must be "clear and unmistakable." In *Metropolitan Edison*, as in *Wright*, the Court concluded that the union's actions were insufficiently clear to constitute a waiver of the individual rights.

In *McDonald v. City of West Branch*, 466 U.S. 284 (1984), the Court explained the rationale underlying that principle. It noted that an arbitral award under a collectively bargained grievance proceeding cannot have preclusive effect because "the union has exclusive control over the 'manner and extent to which an individual grievance is presented,'" *id.* at 291 (quoting *Gardner-Denver*, 415 U.S. at 58 n.19), and therefore "[t]he union's interests and those of the individual employee are not always identical or even compatible," *id.* Thus, "even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration." *Barrentine*, 450 U.S. at 742.

The Court subsequently has invoked those precedents to confirm that an employer may not rest on a collective bargaining agreement's grievance processes to deny an individual worker the right to obtain individualized compensation under a federal statute. *See Atchison, T. & S.F. Ry. Co. v. Buell*, 480 U.S. 557, 564-65 (1987). As the Court there explained, "notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'" *Id.* at 565 (quoting *Barrentine*, 450 U.S. at 737).

Accordingly, "were an arbitration award accorded preclusive effect, an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously." *McDonald*, 466

U.S. at 291. Thus, any arbitration provision agreed to between a union and an employer is unenforceable with respect to such individually asserted statutory antidiscrimination rights.

2. The purpose of labor arbitration is to avoid industrial strife, not to resolve individual rights claims

This Court has long recognized that the differing purposes and objectives of labor arbitration and commercial arbitration support different rules regarding a person's waiver of rights to litigate claims in court. Unlike commercial arbitration, labor arbitration is not "the substitute for litigation"; instead, it "is the substitute for industrial strife" and "has quite different functions from arbitration under an ordinary commercial agreement." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The primary goals of labor arbitration are the furtherance of the parties' "common goal of uninterrupted production under the agreement," *id.* at 582, and "industrial peace" through an agreement to arbitrate "grievance disputes," disputes between the union and the employer over the application of the collective bargaining agreement, *see Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453-55 (1957). *See also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (grievance procedures are commonly designed "to settle disputes between union and employer with respect to the interpretation and application of the [collective bargaining] agreement"). Labor arbitration is thus part of a private system of workplace self-governance, not a substitute forum to litigate statutory claims. And labor arbitrators act with the aim of furthering "industrial peace," not of protecting individual employees. Consequently, even though unions must be authorized to waive employees' collective rights to further the goal of self-governance, they are not authorized to waive employees' rights to litigate statutory claims because such waiver does not further that goal.

3. The labor arbitration process is not well-suited to resolving statutory discrimination claims

Labor arbitration between the union and the employer is ill-suited to resolve individual employees' antidiscrimination claims because it is designed for – and well-adapted to – resolving issues concerning the agreement, not deciding public law claims. Labor arbitrators apply the "law of the shop" in resolving disputes. *Warrior & Gulf Navigation*, 363 U.S. at 582. In arbitrating a grievance, "[t]he labor arbitrator performs functions which are not normal to the courts" (or to employment arbitration), and "the considerations which help him fashion judgments may indeed be foreign to the competence of courts." *Id.* at 581. Labor arbitrators consider "such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, [and their] judgment whether tensions will be heightened or diminished." *Id.* at 582. These factors are essential to furthering workplace self-governance, but may be at best irrelevant – and often antithetical – to the protection of employees' individual rights.

Labor arbitrators generally are ill-equipped to resolve discrimination claims. The arbitrators frequently come from the industry and are often not law-trained.[8] Labor arbitrators are selected based on their familiarity with "the practices of the industry and the shop," *id.* at 581-82, and are experts in applying such practices and interpreting collective bargaining agreements to resolve disciplinary and contractual issues. As this Court has recognized, arbitrators who specialize in "'the law of the shop, not the law of the land,'" may not be "conversant with the public law considerations underlying [a federal statute]." *Barrentine*, 450 U.S. at 743 (quoting *Gardner-Denver*, 415 U.S. at 57). Further, labor arbitrators are chosen by and paid by the union and the employer, and their retention is dependent on their continuing acceptability to both the union and the employer. Because employees have no voice in the selection of the arbitrator or stake in his payment, structural incentives favor the union and the employer in grievances involving employees' individual rights.

4. Union control over the labor arbitration process creates inherent conflicts of interest

A union may not waive employees' individual, noneconomic rights because its obligation is to the bargaining unit as a whole. A union is obliged to represent fairly *all* employees, not to represent *individual* employees' interests. The union might logically choose to target its resources towards the bargaining unit's collective concerns, rather than an individual's antidiscrimination rights. That structural dynamic between the protection of employees' individual rights and the advancement of the union's interests creates a conflict of interest. A union may not, for instance, waive employees' rights to solicit and distribute literature advocating support for or opposition to an incumbent union. *See NLRB v. Magnavox, supra.*

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[8] A 2000 survey of labor arbitrators reported that 39% did not have law degrees. *See* Michel Picher et al., *The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators* 12 (2000), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1000&context=icrpubs.

Precluding a union from waiving employees' rights to a judicial remedy under antidiscrimination statutes also prevents conflict-of-interest concerns between employees' antidiscrimination rights and the union's collective responsibilities to the bargaining unit. As this Court has recognized, under arbitration "an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously." *McDonald*, 466 U.S. at 291. Or the union may "present the employee's grievance less vigorously, or make different strategic choices, than would the employee." *Id.* The union may have a disincentive to press employees' antidiscrimination claims because it wishes to preserve its bargaining power for issues in the collective interest (e.g., higher wages, greater benefits). In some instances, the union might even be a party to discrimination, making the potential for conflicts of interest particularly acute. The union may, for instance, discriminate against older workers to aid younger workers who are not otherwise protected by pension coverage. Or the union may want to promote entry into the union of younger members at the expense of older members. The possibility of discrimination by the union is explicitly recognized under and protected by the antidiscrimination statutes. *See, e.g.*, 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 2000e-2(c) (Title VII).

5. The CBA and arbitration proceedings in this case demonstrate Local 32BJ's conflict of interest and illustrate why unions cannot waive employees' ADEA litigation rights

The foregoing principles apply with full force on the facts of this case. The dispute arose when petitioners retained an affiliated security services contractor, Spartan Security, to provide security for the building. Spartan Security brought in its own personnel and reassigned respondents – the only members of the unit over the age of 50 – from their night watchmen and night starter duties to less desirable positions as night porters and light duty cleaners within the building. *See* Pet. App. 4a. Importantly, "'since the Union had consented to Spartan Security being brought into the building,' the Union could not contest their replacement as night watchmen by personnel of Spartan Security." *Id.* at 4a-5a (quoting JA84 (¶ 18), 90 (¶ 16), 96 (¶ 15)). Local 32BJ thus had a conflict of interest in representing the specific complaint brought by respondents.[9]

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[9] Respondents believe that they have meritorious claims under the ADEA. Local 32BJ's determination not to pursue those claims on the grounds that it perceived they lacked merit (*see* Local 32BJ Br. 2-3) is legally irrelevant because even in *Gardner-Denver* the arbitrator's outright denial of the employees' claims did not waive their right to litigate the same claims. Local 32BJ's decision as to the merit of respondents' claims cannot eliminate respondents' rights to vindicate those claims in some forum. Petitioners implicitly accept that respondents have a right to *some* forum to vindicate their ADEA claims by their insistence that these claims be arbitrated by respondents even though Local 32BJ refused to proceed on the claims.

The CBA arbitration process gave Local 32BJ absolute control over respondents' claims of discrimination, notwithstanding this conflict of interest. Under the CBA, Local 32BJ and not the employee makes the decision to trigger the grievance process and represents the employee in the bringing of the grievance. Local 32BJ compensates the arbitrator, and the process is set up as a contracted-for scheme between Local 32BJ and petitioners. Local 32BJ decides whether to compromise an employee's ADEA claims or withdraw them from the arbitration. *See* CA App. A167-69 (CBA Art. VI).

Local 32BJ was understandably hesitant to challenge the results of a contractual provision to which it agreed. As the court below noted,

> [t]he case before us illustrates why the Supreme Court may be reluctant to treat arbitration provisions in CBAs the same as arbitration provisions in individual contracts. If, as [respondents] allege, the Union refused to submit the wrongful transfer claims to arbitration because the Union had agreed to the new contract, the interests of the Union and the interests of [respondents] are clearly in conflict.

Pet. App. 11a-12a n.5 (citing *Gardner-Denver*, 415 U.S. at 58 n.19). The collectively bargained-for grievance process, therefore, ensured that the union's interest would dominate individual statutory claims, in precisely the context in which those interests were in direct conflict.

It is anomalous to think that a union, which might itself be engaging in discriminatory acts or complicit in an employer's wrongful actions, would be empowered to bind individuals to arbitration agreements that put the union in sole control of any dispute that might arise out of those discriminatory acts. In such a case, employees would be precluded from vindicating their rights at all under the collective bargaining agreement – let alone "'effectively . . . vindicat[ing]'" those rights. *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).[10] That conclusion is doubly true when a claim on behalf of the aggrieved employees is not even brought in the collective bargaining agreement arbitration forum, as was the case here. *Cf. Vaca v. Sipes*, 386 U.S. 171, 185-86 (1967) (holding that it would be a "great injustice" to leave the employee without a federal forum after the union refused to process a contractual grievance).

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[10] Had Local 32BJ actually arbitrated respondents' claims, the agreement would still likely have prevented respondents from "effectively vindicating" their rights. The agreement gives Local 32BJ complete control over "the manner and extent to which an individual grievance is presented." *Gardner-Denver*, 415 U.S. at 58 n.19; *see* CA App. A168 (CBA Art. VI, ¶ 7). Local 32BJ decides whether to pursue the grievance beyond the first step, whether to demand arbitration, and how vigorously to pursue the employee's claim. These decisions will be – and should be, consistent with Local 32BJ's statutory role – influenced by Local 32BJ's assessment of the interests of the majority of employees. *See Barrentine*, 450 U.S. at 742. The employee is not a party to the dispute and thus has a voice and the ability to vindicate his rights only to the extent permitted by Local 32BJ.

C. The ADEA Embodies A Clear Preference For Parallel And Overlapping Processes And Remedies, And That Preference Should Not Be Altered Except By Individuals Acting On Their Own Behalf

1. Congress imposed strict waiver requirements on ADEA rights, which would be undermined if unions were permitted to waive employees' judicial forum rights in collective bargaining agreements

Even if there were not labor-law specific reasons supporting the *Gardner-Denver* holding, the text of the ADEA makes clear that the waiver of "any right or claim" under the statute is disfavored. 29 U.S.C. § 626(f)(1). *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998) ("The [statute] implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word.").

It is beyond dispute that only an individual employee, not the union, can waive his rights under the ADEA. The ADEA requires that any waiver be made by the affected "individual," that it be "knowing and voluntary," and that the individual receive consideration. 29 U.S.C. § 626(f)(1). A union's denial of individual employees' right to any forum in which to pursue their statutory antidiscrimination rights functions as a prospective waiver of the employees' substantive rights, contrary to Congress's clear intent.

Moreover, the legislative history of the statute makes clear that Congress intended to encourage arbitration only where an individual voluntarily waived his right to proceed in court. In Section 118 of the Civil Rights Act of 1991 ("1991 Act"), Congress addressed the issue of arbitration with respect to the ADEA, Title VII, and the ADA. *See* Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (reprinted at 42 U.S.C. § 1981 note). Congress stated that it "encouraged" the "use of alternative means of dispute resolution" such as arbitration, but only "[w]here appropriate and to the extent authorized by law." *Id.* The Committee report expressly emphasized that "any agreement to submit disputed issues to arbitration . . . in the context of a collective bargaining agreement . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in [*Gardner-Denver*]." H.R. Rep. No. 102-40, pt. 1, at 97 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 635.

2. Precluding waiver by unions of individual employees' right to a judicial forum to vindicate statutory antidiscrimination rights comports with Congress's purposes in enacting the ADEA

Allowing unions to waive an employee's right to a judicial forum to vindicate an *individual* right to be free from discrimination – without providing a clear alternative for the employee and without the employee's consent – would contravene the policies behind the federal antidiscrimination laws. These statutes are "designed to provide minimum substantive guarantees to individual workers." *Barrentine*, 450 U.S. at 737. They create individual rights that exist separate and apart from the collective bargaining process. These rights are not "terms" or "conditions of employment." 29 U.S.C. § 159(a). As such, a union should not be permitted to bargain away such rights through the "'majoritarian process[].'" *Barrentine*, 450 U.S. at 737-38 (quoting *Gardner-Denver*, 415 U.S. at 51).

First, antidiscrimination rights should not be waivable by unions because such rights devolve on employees as individuals, not as members of a collective bargaining unit. As the Court explained in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), antidiscrimination law's "focus on the individual is unambiguous." *Id.* at 708. "[T]he basic policy . . . requires that we focus on fairness to individuals rather than fairness to classes." *Id.* at 709. Similarly, in *Connecticut v. Teal*, 457 U.S. 440 (1982), the Court recognized that the "principal focus" of federal antidiscrimination law is "the protection of the individual employee." *Id.* at 453, 455.[11] The text of the ADEA makes clear that statute's focus on protecting "individuals": it is unlawful "to deprive any *individual* of employment opportunities," 29 U.S.C. § 623(a)(2) (emphasis added), or "to fail or refuse to hire or to discharge any *individual* or otherwise discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* age," *id.* § 623(a)(1) (emphases added).

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[11] *Teal* and *Manhart* are Title VII cases, but this Court has observed that the substantive provisions of the ADEA are "derived *in haec verba* from Title VII" and that Title VII precedents apply "with equal force" to ADEA claimants. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (internal quotation marks omitted); *see Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

Because Congress intended for antidiscrimination statutes to protect individuals, only individual employees – not their unions – should be able to waive the right to a judicial remedy. Union-negotiated arbitration agreements preclude individual consent in two important ways: *Ex ante*, the individual employee's consent is not obtained as a condition of the arbitration agreement; *ex post*, after a dispute has arisen, union-negotiated arbitration clauses give the union, rather than the claimant, control over the individual's claim. That lack of individual consent contravenes the individual right provided under the statutes.

Second, antidiscrimination rights may not be waived by unions because they are important *public* rights. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995) (observing that Congress enacted the ADEA and other antidiscrimination statutes as part "of a wider statutory scheme to protect employees in the workplace nationwide"). As such, they contrast with the terms and conditions of employment (e.g., wages), which are essentially private, contractual rights between employees and employers. Indeed, in adopting the antidiscrimination statutes, Congress emphasized that discrimination in the workplace is a serious public concern. *See, e.g.*, *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). While Congress did not go so far as to make the right to be free from discrimination non-waivable, there is no indication that it intended for employees to be deprived of the ability to vindicate this right in court through a non-consensual process, which gives the union, not the individual employee, the power to pursue (or not pursue) the claim.

The Court rejected a similar argument in *Gardner-Denver* in part on policy grounds that apply with equal force to this case. The ADEA shares with Title VII "common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon*, 513 U.S. at 358 (quoting *Oscar Mayer*, 441 U.S. at 756). Like the Title VII right to be protected from discrimination on account of race, color, religion, sex, or national origin, the right under the ADEA to be protected from age discrimination is an individual right, not a collective right granted to workers as a whole and thus not subject to majoritarian decision-making by the union. *See Gardner-Denver*, 415 U.S. at 51-52; *Barrentine*, 450 U.S. at 735-37. Allowing Local 32BJ to waive respondents' right to a judicial remedy under the ADEA "would defeat the paramount congressional purpose" behind the statute. *Gardner-Denver*, 415 U.S. at 51.

3. The right to a jury trial for discrimination claims should not be subject to forfeiture absent a clear and express individual waiver

Unions cannot waive an employee's right to a jury trial for their discrimination claims. The right to a jury trial is a fundamental right guaranteed by the Seventh Amendment. Although this right is waivable by a person individually, courts should "indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *see also Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 307 (1937) ("We do not presume acquiescence in the loss of fundamental rights."). To overcome the "heavy burden against . . . waiver," *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972) (Douglas, J., concurring), it must be shown that the waiver was "voluntary, knowing, and intelligently made," *id.* at 185 (majority).

The right to a jury trial is an integral part of Congress's intent to provide "parallel or overlapping remedies against discrimination" under the anti-discrimination statutes. *Gardner-Denver*, 415 U.S. at 47-48. The ADEA contains an express provision conferring the right to a jury trial. *See* 29 U.S.C. § 626(c)(2); *see also Lorillard v. Pons*, 434 U.S. 575, 582-83 (1978) (holding that, even before that provision was added later that year, the ADEA provided a right to a jury trial). In the ADEA, Congress went beyond the scope of the Seventh Amendment, expressly conferring on plaintiffs the right to a trial by jury in cases seeking equitable, as well as legal, relief. *See* 29 U.S.C. § 626(c)(2). Congress amended Title VII in 1991 to provide an express right to a trial by jury when the claimant seeks compensatory and punitive damages. *See* 1991 Act § 102, 105 Stat. 1073 (codified at 42 U.S.C. § 1981a(c)(1)). The legislative history of the 1991 Act confirms Congress's desire "[t]o protect the rights of all persons under the Seventh Amendment" to a jury trial for discrimination claims. *See* H.R. Rep. No. 102-40, pt. 2, at 29 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 723.[12]

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[12] *See also* 137 Cong. Rec. 14,416 (1991) (statement of Rep. Schiff) ("[T]he right to trial by jury as a general concept in our society was considered so important by the framers of the Constitution that they included it in the Bill of Rights, in the seventh amendment."); *id.* at 28,448-49 (statement of Sen. Mikulski) (noting that "the Constitution has been waived too long and one too many times for American women" and that, "if a serial killer can have a right to a jury trial, . . . certainly a woman who cannot get a job has a right to a jury trial if she is discriminated against").

Taken together, the fundamental nature of the right to trial by jury and the express and expansive statutory recognition of the jury right in the discrimination context compel the conclusion that the right to a trial by jury for statutory discrimination claims cannot be waived except by the knowing and voluntary agreement of the individual employee.

4. The ADEA provision in this CBA serves valid collective antidiscrimination purposes and need not be construed as a waiver of respondents' individual ADEA rights

A collective bargaining agreement provision for resolving statutory discrimination claims in arbitration between the union and the employer – as in the CBA at issue here – serves the purpose of providing for arbitration of collective discrimination claims without affecting individual employees' ability to vindicate their right to be free from discrimination. For instance, Local 32BJ could challenge the employer's imposition of a mandatory retirement age requirement under the ADEA or a policy that disparately impacted minority employees under Title VII. The availability of arbitration in such circumstances would allow Local 32BJ to seek a quick and collective resolution of the claim – and the elimination of the offending policies or practices – without foreclosing individual employees from seeking recourse to the judicial forum.

D. The Duty Of Fair Representation Is Insufficient To Safeguard Employees' Antidiscrimination Rights When Any Vindication Of Those Rights Is Left To Arbitration By The Union

Although in certain circumstances an employee can bring a suit against the union for not adequately representing his individual interests when his challenge to an adverse employment decision has not been vindicated in a collective bargaining agreement grievance process, that remedy is a poor substitute for the employee's ability to bring a statutory claim directly against the employer. Petitioners' reliance (at 42-43) on a breach of the duty of fair representation as an appropriate remedy for respondents is therefore misplaced.

1. A duty-of-fair-representation claim does not directly target the discriminatory wrongdoer

In a case such as this one, the employee brings an ADEA claim because of an adverse employment action made by the employer. A duty-of-fair-representation claim, on the other hand, targets the union for its failure adequately to represent the employee's interests. Such a claim does not directly target the wrongdoer – the employer – for having discriminated against the individual employee. The employee thus does not have the litigation benefit of discovery against the employer and the full panoply of rights and tools that come from the litigation process. The remedies available to the employee in a duty-of-fair-representation case are also limited. Under the ADEA, the remedies are substantial, including back pay, front pay, equitable relief (including reinstatement or promotion to a position), attorney's fees, and, if the discrimination is willful, liquidated damages. *See, e.g.*, 29 U.S.C. § 626(b) (ADEA remedies); 42 U.S.C. § 2000e-5(g), (k) (Title VII remedies); 42 U.S.C. § 12117(a) (ADA, adopting Title VII remedies). Punitive and compensatory damages are also available under Title VII and the ADA. *See* 42 U.S.C. § 1981a(b). Although a union may be liable in damages for the economic losses sustained by the employee from the employer's actions, the union does not have control over the workforce. Thus, no remedy against the union is able to match the injunctive remedies provided in the statute, such as adjusting pay going forward, reinstatement to a prior position, or promotion to a position that would be deserved but for the discrimination. Success on a claim for breach of the duty of fair representation, therefore, provides an incomplete remedial scheme for an employee who alleges harm from an employer's violation of his statutory anti-discrimination rights.

2. A duty-of-fair-representation claim imposes procedural hurdles that a victim of discrimination does not face outside the collective bargaining agreement context

An employee bringing a claim against the union for breaching the duty of fair representation also faces significant hurdles not present in a claim directly against the wrongdoing employer. As the Court noted in *Gardner-Denver*, "a breach of the union's duty of fair representation may prove difficult to establish." 415 U.S. at 58 n.19. Congress specifically recognized the duty of fair representation's shortfall in protecting individual rights by making anti-discrimination protections applicable against unions.

See id. (citing 42 U.S.C. § 2000e-2(c) (applying Title VII to unions)); 29 U.S.C. § 623(c) (ADEA, making age discrimination by unions unlawful).

Even when those difficulties can be surmounted, the duty of fair representation is insufficient to protect the rights of individual employees. That duty only requires the union not to act "arbitrar[il]y, discriminator[il]y, or in bad faith" toward a member of the bargaining unit. *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998); *accord United Steelworkers v. Rawson*, 495 U.S. 362, 372-73 (1990). A union might, without breaching its duty of fair representation, reasonably and in good faith decide not to pursue a meritorious claim in arbitration. A union might, for instance, believe that the claim is unlikely to succeed; that the claim has been adequately remedied by the employer; or that the union might benefit by targeting its resources to pursue other claims perceived to be in the collective interest. *See Barrentine*, 450 U.S. at 742 ("[A] union balancing individual and collective interests might validly permit some employees' statutorily granted . . . benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.").

To prevail on a claim that the union breached the duty of fair representation, the employee must overcome a "highly deferential" standard of review that favors the union. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991). Courts do not generally second-guess a union's judgment about whether to bring a claim. Indeed, a "union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." *Marquez*, 525 U.S. at 46. As long as the union has some good-faith reason – however weak – for not bringing a claim, the employee will be unable to establish a breach even if his individual rights are effectively stymied. Even negligence in representing an employee is not enough to breach the duty of fair representation. *See Rawson*, 495 U.S. at 372-73. As the Seventh Circuit has observed, a "contract/[duty-of-fair-representation] suit does not get to first base unless the worker shows that the union has abandoned him to the wolves." *Pease v. Production Workers Union*, 386 F.3d 819, 823 (7th Cir. 2004) (Easterbrook, J.).

II. ON THE FACTS OF THIS CASE, RESPONDENTS ARE NOT SUBJECT TO ANY VALID ARBITRATION AGREEMENT

Even if it were *legally* possible for a union to waive an individual employee's right to bring a lawsuit to vindicate an ADEA claim, it would still be necessary for the collective bargaining agreement *contractually* to provide an arbitral forum for the employee. Arbitration cannot be compelled when an arbitration procedure fails to permit the person effectively to vindicate his rights.

Accordingly, this case presents a lack of contractual sufficiency analogous to the type addressed in *Wright*, where this Court rejected a claim that the union waived an employee's right to bring a statutory discrimination claim on the ground that the collective bargaining agreement failed to clearly and unmistakably incorporate such a waiver. *See* 525 U.S. at 80-82. Notwithstanding that the ADEA is specifically referenced in the CBA here, that form of notice is insufficient to constitute a clear and unmistakable waiver of respondents' individual litigation rights because the CBA does not create an alternative forum in which respondents can individually pursue those statutory claims. Respondents here are not authorized or empowered to bring an arbitration to vindicate their individual claims, and therefore the contract is insufficient in conferring a procedural remedy for respondents that would support Local 32BJ's purporting to waive their individual rights. An employee cannot be bound to arbitrate by an agreement that does not provide him the right to arbitrate.

Nor does petitioners' suggested alternative form of arbitration provide a basis for sustaining a motion to compel, because that proposed arbitration is outside the CBA and unsupported by any binding written agreement. Because the specific provisions of the CBA fully support the Second Circuit's judgment not to compel arbitration, that ruling should be affirmed.

A. For The Federal Arbitration Act To Compel Arbitration, The Arbitration Provision Must Enable Both Parties To "Effectively Vindicate" Their Rights

Even if the Court were to reject our submission that a union cannot lawfully waive employees' rights to a judicial forum for resolving their claims under federal antidiscrimination statutes by entering into a collective bargaining agreement with an arbitration provision, such a waiver is enforceable under applicable Federal Arbitration Act ("FAA") case law only if the employee "'*effectively* may vindicate [his or her] statutory cause of action in the arbitral forum.'" *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors*, 473 U.S. at 637) (emphasis added; alteration in original); *see also Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000).

One precondition to determining the effective vindication of rights is whether a consensual process exists. Both sides must consent to arbitration before it may be compelled. *See Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) ("[a]rbitration . . . is a matter of consent, not coercion"); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that [an arbitration] contract cannot bind a nonparty."); *see also Barrentine*, 450 U.S. at 744 ("An arbitrator's power is both derived from, and limited by, the collective-bargaining agreement.").

In applying those general FAA principles to collective bargaining agreements,[13] for a union-bargained arbitration clause to be enforceable against an individual employee, several requisites must be satisfied. At a minimum, the employee's claim would have to be pursued in arbitration in a manner enabling the employee to vindicate his statutory rights. If the union decided not to pursue an employee's claim, then arbitration cannot provide an alternate viable forum. The employee also must be able to retain some control of the case and to obtain the same or similar relief to what Congress provided in the statute. As *Gardner-Denver* recognized, "the union's exclusive control over the manner and extent to which an individual grievance is presented" creates the potential for "the interests of the individual employee [to] be subordinated to the collective interests of all employees in the bargaining unit." 415 U.S. at 58 n.19. Ensuring that the individual has at least some control over whether and how to bring his claims is vital to allowing the individual to vindicate his individual rights under the antidiscrimination statutes.

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[13] The Court has never held that the FAA does apply to collective bargaining agreements, *see Wright*, 525 U.S. at 77 n.1 (declining to decide whether the FAA applies), and need not decide this issue in this case if it agrees with respondents that they have no right to arbitrate under the CBA.

B. The CBA At Issue Confers No Requirement Of Arbitration Or Right To Arbitrate On Individual Employees

1. The CBA in this case fails to meet basic preconditions supporting a motion to compel arbitration at several, fundamental levels. *First*, by its plain terms, the arbitration provision in the CBA empowers the arbitrator "to decide all differences arising between *the parties* as to interpretation, application or performance of any part of this Agreement and such other issues as *the parties* are expressly required to arbitrate before him under the terms of this Agreement." CA App. A167 (CBA Art. VI ¶ 1). The "parties" to the arbitration provision in this CBA are Local 32BJ and petitioners (through the RAB). *See* JA47. Individual employees do not have a right to invoke the arbitration provisions of this CBA. *See* Local 32BJ Br. 6 ("While Local 32BJ has the right to request arbitration of grievances on its side, the individual employee-grievants have no such right.").

Second, not only does the employee have no right to invoke the CBA's arbitration provision, the employee also has no power to exercise any control over a CBA arbitration. The CBA specifies that "[a]ll Union claims are brought by the Union alone" and that "no individual [may] compromise or settle any claim without the written permission of the Union." CA App. A168 (CBA Art. VI ¶ 7). The CBA further provides that the individual employee who is the grievant does not need to be present at the hearing, so long as Local 32BJ "appears at [the] arbitration." *Id.* And Local 32BJ has the power to compromise a claim, even over the employee-grievant's objection, by settling the claim or agreeing to dismiss or withdraw it. *See* Local 32BJ Br. 7. Through its complete control over the arbitration process under the CBA, Local 32BJ has denied any ADEA remedial process to respondents. Without a provision enabling employees individually to arbitrate their ADEA claims, the Court could decide this case on the basis that, before a waiver of an individual's statutory antidiscrimination rights may be effectuated by a union, the union must at a minimum provide an arbitral forum for the employee to vindicate those rights. This CBA does not contain any such provision – individual employees have no power to invoke this CBA's arbitration provision without Local 32BJ's consent and Local 32BJ's control over the litigation. When, as here, Local 32BJ refuses to take respondents' claims to CBA arbitration, there is no arbitration to compel.

Third, the requirement for payment of costs associated with the arbitration provides further support that the individual employees in this case are not required to arbitrate or intended to be subject to the arbitration provision. The agreement provides that all expenses "shall be borne fifty percent (50%) by the Employer and fifty percent (50%) by the Union" (except in limited circumstances when the employer pays all expenses). CA App. A167 (CBA Art. VI ¶ 2). If the CBA contemplated that employees would be subject to arbitration, or able to invoke the arbitration provision, it would have included specific language governing how the arbitration's costs would be allocated between the employee and Local 32BJ or employer, but the CBA is silent on that point.

By its plain terms, therefore, the CBA does not provide procedures for an arbitration initiated or pursued by anyone other than the two "parties" – Local 32BJ and petitioners. The Court should not "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Waffle House*, 534 U.S. at 294. Because the CBA in this case is insufficient to constitute a "waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination," this Court can affirm the Second Circuit's judgment without reaching the question whether "such a waiver would be enforceable." *Wright*, 525 U.S. at 82.

2. That reading is faithful to the drafting history of this CBA. As Local 32BJ explains, in 2000 the RAB sought to include a provision permitting the employer to require, "as a condition of employment, that employees are required to submit all claims of discrimination in employment to the Arbitration process under this Agreement." *See* Local 32BJ Br. 11. When Local 32BJ rejected inclusion of that provision, the RAB backed down and made no effort in subsequent negotiations to include that proposal in later CBAs, such as the one at issue here. *See id.* at 12, 14. That drafting history could not be clearer that both Local 32BJ and petitioners understood that individuals would *not* be "required to submit all claims of discrimination in employment to the Arbitration process under this Agreement."

In this case, Local 32BJ exercised its powers under the CBA by refusing to bring respondents' ADEA claims to arbitration, as even petitioners concede. *See* Pet. Br. 8; *see also* JA99. That action reflected the inherent conflict of interest identified by this Court in *Gardner-Denver*, because Local 32BJ had agreed with petitioners to allow Spartan Security to devise a new employment scheme at the building where respondents work, thus enabling petitioners to displace respondents from their positions and to move them to less favorable positions. *See* JA83-84, 90, 96. Through Local 32BJ's control over the CBA arbitration process and its denial of arbitration to respondents, respondents had no arbitration that could be compelled.

C. Petitioners' Alternative Suggestion Of Arbitration Does Not Warrant Reversal Of The Second Circuit's Judgment

In their brief, petitioners appear to recognize that the CBA itself does not support their motion to compel arbitration. They instead make much of their offer in February 2005 to provide an alternative form of arbitration. *See* Pet. Br. 3, 8, 10, 13, 16, 39-40. That offer was made one year after Local 32BJ refused to pursue respondents' ADEA claims in arbitration under the CBA, more than eight months after respondents filed this lawsuit, and after six (of eight total) arbitration hearings between Local 32BJ and petitioners had already been held.

1. Importantly, that offer of arbitration was not made pursuant to any provision of the CBA, but rather as an attempt to induce arbitration between two litigants. To be sure, Local 32BJ "consent[ed] to [respondents'] use of the Office of Contract Arbitrator (OCA), created under the Collective Bargaining Agreement . . . , as the forum for [respondents'] private attorney to pursue [respondents'] statutory age discrimination claims." Pet. App. 42a. That offer, however, merely gave respondents an option to arbitrate their claims in the same place and with the same arbitrator that Local 32BJ could have used – but did not use – to pursue respondents' age discrimination claims under the CBA. Local 32BJ did not offer to bring respondents' claims in arbitration or to fund that arbitration. Nor did it suggest any basis in the CBA for such arbitration. Rather, Local 32BJ merely offered to accommodate a request by petitioners if respondents also found that proposal agreeable.

2. The suggested use of the Office of the Contract Arbitrator not only was completely outside the confines of the CBA, but also was fundamentally disadvantageous to respondents. *First*, the arbitrator "suggested" by petitioners had already observed Local 32BJ withdraw respondents' ADEA claims – an action that necessarily would prejudice him against respondents in any subsequent arbitration on those very claims. *Second*, petitioners and Local 32BJ pay the salary of the arbitrator and have the power to remove him for any reason. *See* Local 32BJ Br. 9 ("[e]ither Local 32BJ or the [RAB] may strike an arbitrator from the panel at any time for any reason"). Individual employees do not have such powers. Thus, respondents would be stuck in an arbitration over which their adversary had the ultimate power over the decision-maker. That is hardly the kind of level playing field that adequately protects a person's rights. *Third*, the arbitration would have been at considerable cost to respondents. Local 32BJ specifically offered the Office of the Contract Arbitrator only "as long as the parties to this lawsuit, and not the Union, pay the costs associated with the arbitration." Pet. App. 42a. Those costs would have been significantly higher for respondents than litigation in court.[14]

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[14] The proposed arbitration would have imposed significant additional and unnecessary costs on respondents in light of

3. Finally, the arbitration proposed by petitioners cannot be deemed "mandatory" in any sense that would sustain a motion to compel arbitration under the FAA. Petitioners' proposal was no different than if two litigants decided that, instead of litigating in court, they would engage an arbitrator with the American Arbitration Association without any written contract requiring them to arbitrate. Because the offer was not arbitration under the terms of the CBA and was not mandatory under any other written agreement, it was insufficient to trigger any purported waiver of respondents' rights to litigate their statutory claims.

Certainly, respondents could have voluntarily entered into a side agreement to arbitrate their dispute with petitioners, but nothing *required* them to accept petitioners' offer of alternative arbitration – certainly not the CBA, which contains no provision sanctioning, requiring, or facilitating any such alternative arbitration. Although petitioners seek (at 10) to compel arbitration on the grounds that some *alternative* arbitral forum is available to respondents, that alternative forum is *not* arbitration under the CBA or under any written agreement cognizable under the FAA. *See* 9 U.S.C. § 4 (authorizing party aggrieved by "the alleged failure, neglect, or refusal of another to arbitrate under a *written* agreement for arbi-

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Local 32BJ's clear position that respondents must pay for half of the costs associated with petitioners' suggested arbitration process. *See* Pet. App. 42a. Total fees and costs in an average arbitration may range from $4,350 to $11,625, compared to filing fees of $221 in a typical urban state court and $210 in the New York County Supreme Court. *See* Public Citizen's Congress Watch, *The Costs of Arbitration* 40-42 (Apr. 2002), *available at* http://www.citizen.org/documents/ACF110A.PDF; http://www.nycourts.gov/supctmanh/case_commencement.htm.

tration" to petition for order directing arbitration) (emphasis added).

The suggestion of any such form of alternative arbitration not provided for under the CBA, therefore, cannot be a basis for a motion to compel arbitration. To hold otherwise would allow an employer to support a motion to compel arbitration by the mere expedient of having written a letter to an employee offering to arbitrate a dispute once the employee filed a lawsuit. Petitioners offer no support for that extraordinary proposition.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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REPLY
BRIEF

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No. 07-581

IN THE
Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,

Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page ii of Petitioners' Opening Brief, and there are no amendments to that Statement.

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Despite the Employees' and their amici's efforts to redefine this case on appeal, the sole issue for this Court is whether the Second Circuit erred in holding that collectively-bargained agreements to arbitrate ADEA claims, no matter how clear and unmistakable, are unenforceable. There is no serious dispute that the methods by which such claims are resolved fall within the core authority of the Union, under Section 9(a) of the NLRA, to bargain over terms and conditions of employment. The only question is whether Congress ever enacted an exemption from that authority for claims that arise under the ADEA.

The answer to that question is no. The Employees, on whom the legal burden rests, fail to provide any evidence whatsoever of a legislative carve-out for ADEA claims. The provisions they cite – Section 626 of the ADEA and Section 118 of the Civil Rights Act of 1991 – do not address collectively-bargained forum selection clauses, must less condemn them. If anything, the plain text of Section 118 endorses arbitration. The Employees also fail to blunt the force of *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991), which rejected the idea that arbitration was incompatible with the ADEA's purposes, dismissed all contention that Congress had intended to make non-waivable the right to a judicial forum under the ADEA, and reaffirmed the general rule that arbitration should be viewed as not entailing any waiver of substantive rights.

Alexander v. Gardner-Denver, 415 U.S. 36 (1974), is also of no help to the Employees' position. The case is simply not on point. It concerned a situation in which the employee was not able to raise, and the arbitrator lacked authority to consider, statutory claims at an arbitration proceeding, and then sought to bring them in court. Later cases expressly described it as a decision about collateral estoppel and preclusion. *See Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 76 (1998); *Gilmer*, 500 U.S. at 35. Here, by contrast, the issue is whether an agreement is enforceable that expressly submits all statutory as well as contractual claims to arbitration. *Gardner-Denver* did not speak to that question. Broader language in the decision cited by the Employees constitute dicta that largely reflected the disrepute in which arbitration was held at the time.

Unable to justify the Second Circuit's per se rule against collectively bargained arbitration of statutory claims, the Employees and their amici seek to change the Question Presented – and even the facts. They claim now that they were denied any opportunity to present their ADEA claims before an arbitrator. The irony of their position, of course, is that they have resisted all efforts to compel them to arbitrate. In reality, the record shows that after the Union withdrew their ADEA claims (even while continuing to prosecute their contractual claims), it ceded to them full, untrammeled access to the arbitral forum. The Union confirmed the availability of the original forum. Pet. App. 42a. The Employees' own counsel acknowledged that he had received "repeated requests" for arbitration "under the Union's collective bargaining agreement." JA 76. The Employees, however, refused to return to arbitration, opting instead to file this action in federal court.

The Employees also rely on a fanciful bargaining history offered by Local 32BJ – completely outside the record – supposedly showing that the parties to the CBA did not intend to require the Employees to arbitrate individually. The Court should dismiss this eleventh-hour "evidence" out of hand. There was no presentation of these materials to any lower court and no opportunity to contest their accuracy, which is greatly lacking. The argument is not even plausible on its face; the Employees cannot explain why the employers would bother negotiating an agreement requiring arbitration of "all claims" as the "sole and exclusive remedy" – including specifically statutory ADEA claims – while exempting employees from the same obligation to arbitrate.

Following its customary practice to "deal with the case as it came here and affirm or reverse based on the ground relied upon below," *Peralta v. Heights Med. Center, Inc.*, 485 U.S. 80, 86 (1988); *see also Bragdon v. Abbott*, 524 U.S. 624, 637 (1998), this Court should reject the Employees' attempt to change the issue presented here. Rather, based on the record facts and applicable law, arbitration should be compelled because there is a clear and unmistakable waiver of the judicial forum, and the Employees have access to the arbitral forum to pursue their ADEA claims, in full accord with the safeguards outlined in this Court's *Gilmer* decision.

ARGUMENT

I. *GARDNER-DENVER* DID NOT HOLD THAT UNIONS ARE UNABLE TO BARGAIN ABOUT THE FORUM FOR RESOLVING THEIR MEMBERS' ADEA CLAIMS.

The Employees and their amici argue that *Gardner-Denver* held that unions cannot bargain over the type of forum in which their members' statutory discrimination claims will be resolved. Ignoring *Wright*'s express reservation of the question, 525 U.S. at 77, they maintain that this Court already settled the blanket unenforceability of such agreements more than thirty years ago. Beyond its surface implausibility, their position misreads *Gardner-Denver*, ignores its facts and limited holding, and focuses instead on dicta that were largely abandoned in later decisions.

A reading of *Gardner-Denver* as imposing an inviolate rule about the permissible scope of a forum selection clause contained in a collective-bargaining agreement goes well beyond the facts of that case and finds no support in its rationale. *Gardner-Denver* involved a then-conventional labor contract arbitration where the arbitrator was confined exclusively to issues arising under the contract and had no authority to venture beyond to consider external law. *See, e.g.*, *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 568 (1960). The decision did not analyze the powers of a union under the NLRA or even discuss Section 9(a), the provision that defines the ambit of a union's representative capacity. Any language about the extent of a union's authority to bargain over employees' statutory claims would have been the purest dicta, for the collective-bargaining agreement there did not mention or reach statutory claims; they were not submitted for arbitration; and the arbitrator had no power to decide them. 415 U.S. at 38-43, 53. There was no occasion for the Court to decide the scope of the union's power in a case where the union had not exercised it, and "no holding can be broader than the facts before the court." *United States v. Stanley*, 483 U.S. 669, 680 (1987).

Rather, *Gardner-Denver* established a simple rule of non-preclusion for its factual scenario: the mere submission of contractual grievances to arbitration does not preclude adjudication of statutory claims, where the two are of a "distinctly separate nature," 415 U.S. at 50, and the arbitration process does not encompass the statutory claims. When a collective-bargaining agreement does not even provide for arbitration of statutory claims, then whatever arbitration occurs does "not . . . preclude subsequent statutory actions." *Gilmer*, 500 U.S. at 35. The Court even expressed its holding that way, stating that "an arbitrator's resolution of a contractual claim is [not] dispositive of a statutory claim under Title VII." 415 U.S. at 47. *Gardner-Denver* does not control here, where the Union clearly agreed on behalf of its members that their statutory discrimination claims would be arbitrated.

Contrary to the Solicitor General's position, it is this Court, not Petitioners, that has consistently explained *Gardner-Denver* as establishing a rule about preclusion rather than union authority. U.S. Br. 14. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728

(1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984) – cases on which the Employees heavily rely – the Court held that where the relevant collectively-bargained agreements did not encompass statutory claims, arbitral decisions did not carry "res judicata or collateral-estoppel effect" to bar a federal court action. *McDonald*, 466 U.S. at 307-08; *see also Barrentine*, 450 U.S. at 745. In *Gilmer*, the Court made the point even more explicitly, noting that *Barrentine* and *McDonald* "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims," but rather "the quite different issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." *Gilmer*, 500 U.S. at 35. The Court has never retreated from that understanding of *Gardner-Denver*'s holding.

The Employees' main argument for their strained interpretation of *Gardner-Denver* centers around a footnote, 415 U.S. at 58 n.19, quoted in later decisions, in which the Court expressed a "concern" that where the union controls the presentation of an individual grievance, the interests of the individual member "may" be subordinated to the interests of other employees, and the union will not faithfully represent the member. Resp. Br. 15, 18; U.S. Br. 13-14. The possibility of such a conflict might distinguish the collective bargaining setting from one in which the individual agrees to arbitrate his own claims. *See Gilmer*, 500 U.S. at 35. But that point plainly was not the basis of the holding in *Gardner-Denver*, where statutory claims were not even (and could not have been) presented to arbitration and there was no clear and unmistakable agreement to do so, as contemplated in *Wright*.

Nor does that concern justify a blanket rule, like the one applied by the Second Circuit, forbidding the Union from ever agreeing to an arbitral forum for hearing its members' ADEA claims. In the overwhelming majority of instances where a collective-bargaining agreement provides for arbitration of statutory claims, the union diligently pursues the employee's grievances, and even the major labor organizations agree that in such circumstances arbitral promises should be enforceable. *See* AFL-CIO/Change to Win ("CTW") Br. 8-9; 32BJ Br. 13, 18-19. Even if there is a possibility in some situations that a union might not fulfill its obligations, the mere "risk" of such an outcome "is too speculative to justify the invalidation of an arbitration agreement." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000). And remedies exist to redress any egregious cases. *See* Pet. Br. 42-43.

Every employee must be guaranteed an arbitral forum in which his claims may be heard. But here, the Employees and their counsel unquestionably had such a forum – indeed, the very *same* forum, against the *same* opponent, before the *same* arbitrator, with the *same* authority to apply "appropriate law," Pet. App. 48a, and "grant any remedy required to correct a violation," *id.* at 45a, to which they had initially submitted their ADEA claims. Once the Union decided it would no longer advance the Employees' ADEA claims, it ceded the forum to them so that they could pursue those claims with their private counsel. *Id.* at 42a. The Employees would have had complete and unfettered control over the presentation of their claims in that forum had they gone forward with the arbitration available to them.[1]

In response to these undisputed facts, the Employees weakly assert that the hearing might have been unfair, because Arbitrator Pfeffer might have been biased, Resp. Br. 26, or because arbitrators "generally are ill-equipped" to resolve discrimination claims since they "frequently come from the industry" and are "often not law-trained." *Id.* at 25-26. Of course, the Employees precluded any real testing of the fairness of the arbitration by bypassing that forum in favor of going to court. Moreover, OCA arbitrators include lawyers who are knowledgeable about employment discrimination law. Pet. Br. 7; JA 68-69.[2] Arbitrator Pfeffer, for example, is an experienced employment lawyer, formerly a partner at a union-side law firm, who is a full-time grievance arbitrator. Pet. Br. 9 n.4; JA 68-69. *Green Tree* also rejected speculative concerns about arbitral impartiality as a ground for declining to compel arbitration. *See* 531 U.S. 79, 89-90 (2000). All of these are merely the kinds of generalized attacks on the adequacy or fairness of arbitration that this Court has repeatedly rejected as being "'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)). Such claims are "best left for resolution in specific cases" where they actually apply. *Id.* at 33.

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[1] Contrary to the Solicitor General's rhetoric that this was an "extra-contractual, *ad hoc*, and post-dispute arbitral arrangement manufactured between the employer and the Union," U.S. Br. 20, and similar statements in the Employees' and Local 32BJ's briefs, the record evidence demonstrates otherwise. The Employees' counsel acknowledged in his District Court affidavit that he had received "repeated requests" for arbitration "*under the Union's collective bargaining agreement.*" JA 76 (emphasis added). The Union ceded the original contractual forum to the Employees, and the affidavit from the Union's counsel confirmed its availability, rather than created an entirely new forum. Pet. App. 41a. Nothing in the CBA foreclosed the Union from deferring to the Employees – who were equally bound by the promise to arbitrate, *see* Point III *infra* – the responsibility to prosecute their own claims. *See, e.g., Hill v. Washington Metro. Area Transit Auth.*, 309 F. Supp. 2d 63, 67 (D.D.C. 2004) (noting that "individual employees often have access to arbitration in grievance processes pursuant to collective bargaining agreements"). In any event, whether as a contractual matter such a procedure was allowed under the CBA is in the first instance for the arbitrator to decide. *See* pages 22-23 *infra*.

The Solicitor General repeatedly describes the *Gardner-Denver* footnote as expressing a "conflict-of-interest" rationale, according to which the union has an "inherent conflict" with the individual member whose claim it would arbitrate, making every agreement to arbitrate negotiated by a union invalid. U.S. Br. 7, 8, 13, 16 (citing *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974)); *see also* Resp. Br. 15. But the argument is specious. "Self-interest" arises when the union seeks to protect itself or advance its own ends to the detriment of its members. In *Magnavox*, for example, the union sought to impair the employees' choice of their bargaining representative, thereby entrenching itself. 415 U.S. at 325. Here, by contrast, the Union had no self-interest at stake when it agreed that employees must submit their ADEA claims against their employers to the arbitral forum. Such a waiver neither helped nor hurt the Union, and therefore no "inherent" conflict existed.

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[2] The Employees cite a study showing that in 2000, 39% of labor arbitrators did not have law degrees. Resp. Br. 26 n.8. That means 61% of labor arbitrators *did* have law degrees. Obviously, such statistics do not show that all arbitrators are unqualified to hear discrimination claims.

It would be especially improper to read *Gardner-Denver* more broadly than its narrow holding because its dicta reflect antiquated views about arbitration that this Court long ago abandoned. The entire final section of the decision was devoted to explaining how arbitral processes are "comparatively inferior" to adjudication, 415 U.S. at 57, a position now repeatedly repudiated. And the broadest dicta cited by the Employees and their amici, stating that Title VII rights cannot form part of the collective-bargaining process, was explicitly premised on the Court's view (spelled out in the same paragraph of the decision) that Title VII rights to a judicial forum were not waivable. *Id.* at 51-52. That view relied solely on *Wilko v. Swan*, 346 U.S. 427 (1953), which was overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), and expressly rejected in *Gilmer.* In light of the "radical change, over two decades, in the Court's receptivity to arbitration," *Wright*, 525 U.S. at 77, reliance on bits of superseded dicta would be singularly inappropriate.

Gardner-Denver did not consider, much less decide, whether a union can agree to the arbitration of its members' ADEA claims. Principles of stare decisis are thus inapplicable here. Resp. Br. 19. A decision holding such forum selection clauses enforceable would be entirely consistent with the holdings of *Gardner-Denver* and its progeny.

II. A UNION HAS THE AUTHORITY TO AGREE TO THE ARBITRATION OF ITS MEMBERS' ADEA CLAIMS.

The authority granted to a union under Section 9(a) of the NLRA to bargain about the conditions of its members' employment is extremely broad, covering any topic that is "germane to the 'working environment.'" *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring)). The Employees argue that the choice of forum for statutory discrimination claims lies outside that power. But neither the NLRA nor the ADEA provides a basis to conclude that Congress excluded arbitration of statutory claims from the union's bargaining authority. As *Gilmer* held, the right to a judicial forum is exclusively a procedural right whose waiver does not diminish any substantive guarantee under the ADEA. And, as *Gilmer* taught, 500 U.S. at 26-27, in the absence of clear statutory disapproval of collectively-bargained arbitral agreements or an "inherent conflict" with the statutory purposes – neither of which the Employees have demonstrated – such an agreement is enforceable.

A. The NLRA Provides Broad Authority To Bargain Over Methods of Resolving Statutory Claims.

Neither the Employees nor their amici directly dispute that the arbitration of statutory discrimination claims falls within the broad ambit of "rates of pay, wages, hours of employment, or other conditions of employment" over which bargaining is required under the NLRA. 29 U.S.C. §§ 159(a), 158(a)(5), 158(d). This Court has recognized that both the method of resolving grievances arising out of the employment relationship, *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991); *see also United States Gypsum Co.*, 94 NLRB 112, 131 (1951), and the elimination of discrimination in the workplace, *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 69 (1975); *see also Star Tribune*, 295 NLRB 543, 548 (1989), are mandatory subjects of bargaining. It follows that the forum selected for the resolution of discrimination claims is similarly a proper subject of bargaining.[3]

The Employees contend, however, that while a union can waive "collective and economic rights," it lacks authority to waive "individual, non-economic rights," including those in the ADEA. Resp. Br. 21. This distinction misapprehends the law. A union's ability to waive statutory rights depends not on some imagined classification scheme, but simply on whether Congress intended the specific rights at issue to be non-waivable. For example, although wages relate to "collective, economic rights," and are by definition a mandatory subject of bargaining, Congress has removed the union's authority to waive the statutory minimum wage. *Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 602-03 (1944). Conversely, although the right of union officials not to be disciplined more severely than other employees for participation in an unlawful work stoppage is an "individual, non-economic" right, this Court has held that the union may "choose to bargain away this statutory protection to secure gains it considers of more value to its members." *Metropolitan Edison v. NLRB*, 460 U.S. 693, 707 (1983).

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[3] Even if the arbitration of statutory discrimination claims is not deemed to be a mandatory subject of bargaining, it is certainly a permissive one, and an employer and union may agree to such a provision, as they did here. "A matter that is not a mandatory subject of bargaining, unless it is illegal, may be raised at the bargaining table to be discussed in good faith, and the parties may incorporate it into an enforceable collective-bargaining agreement." *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 n.13 (1981) (citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958)).

It is the Employees and the Solicitor General, not Petitioners, who have a "mistaken understanding" of *Metropolitan Edison*. U.S. Br. 17; *see also* Resp. Br. 22 n.7. The Court's principal rationale for allowing waiver by the union in that case was not that the right was economic in nature, but rather that the NLRA specifically contemplates such waivers. 460 U.S. at 706 n.11. Similarly, the Court in *Metropolitan Edison* distinguished *Gardner-Denver not* because it "involve[d] a statute other than the NLRA that protects an individual right," U.S. Br. 17, but because "waiver would be inconsistent with the purposes of the statute at issue there" (an observation nullified by *Gilmer*). 460 U.S. at 706 n.11; *see also Magnavox*, 415 U.S. at 328-29 (Stewart,

J. concurring) ("[T]he Board and the courts should not relieve the parties of the promises they have made unless a contractual provision violates a specific section of the [NLRA] or a clear underlying policy of federal labor law.") The touchstone of the analysis is always Congressional intent.[4]

Moreover, the Employees' position ignores the fundamental distinction between *substantive* statutory rights and *procedural* ones under the ADEA. Substantive ADEA rights cannot be waived by anyone, whether union or employee. However, procedural rights – such as the right to a judicial forum – may be waived, consistent with Congressional intent. *Gilmer* held that waivers of a judicial forum are enforceable precisely because the employee does not forgo any entitlement to substantive relief. 500 U.S. at 26-27; *accord Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Arbitral forums are equally competent as judicial ones to render fair, impartial decisions consistent with applicable law and to deliver equivalent remedies.[5] *Id.* Thus, cases like *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), Resp. Br. 23, are beside the point, because arbitration does not involve the loss of any "minimum substantive guarantees." *Id.* at 565 (internal quotation and citation omitted).

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[4] Neither Employees nor their amici address *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 826-30 (3d Cir. 1991) (en banc) (Alito, J.), which expressly rejected the argument that *Gardner-Denver*, *Barrentine*, and *McDonald* precluded a public sector union from consenting, on behalf of its members, to future drug testing, notwithstanding their Fourth Amendment rights. *See* Pet. Br. 24.

[5] Indeed, the CBA here specifically provided that the Office of Contract Arbitrator would apply the same law and have available the same remedies as would exist in a court action. Pet. Br. 5-6; Pet. App. 43a, 48a.

It is entirely consistent with a union's traditional, statutory function for it to bargain over the forum used to hear the ADEA claims of its members. Employees have much to gain from a more streamlined and efficient system of dispute resolution, especially one bargained for by the union, and have no remedies or outcomes to lose. Pet. Br. 26-30; *see also Circuit City*, 532 U.S. at 122-23. Nothing in the NLRA precludes such bargaining or prevents enforcing such agreements.[6]

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[6] The Employees acknowledge that affirmance of the Second Circuit's rule would mean that an employer would be free to bypass the Union and enter into arbitration agreements directly with individual employees per *Gilmer*, but fail to explain how Congress could have intended such an anomalous result, or to provide any evidence that Congress did. *See* Resp. Br. 21 n.6 (citing *Airline Pilots Ass'n Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999), *adopted as opinion of en banc court*, 211 F.3d 1312 (2000)). The AFL-CIO and Change to Win suggest that even though employers would be able to enter into agreements directly with employees for arbitration of statutory claims, they would nonetheless have to bargain with the union over making such agreements a condition of employment. AFL-CIO/CTW Br. 17. But this "solution" to the *ALPA* problem would give unions and employers the same ability to enter into agreements requiring arbitration of statutory claims that the court below said were not enforceable. The Solicitor General tries to avoid the holding of *ALPA* by suggesting that it is unnecessary to decide what level of union participation, if any, would be required for an employer to

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B. Congress Did Not Preclude Collectively-Bargained Waivers of a Judicial Forum For ADEA Claims.

Under settled FAA jurisprudence and the longstanding national policy favoring labor arbitration, once the Union exercised its collective-bargaining authority to agree to arbitration, the burden is on the Employees to show that Congress did not intend unions to have the power of forum selection with respect to a subset of workplace claims. Especially in light of the fact that arbitration does not diminish substantive rights, the Employees can escape the arbitral promise made on their behalf only if Congress has "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," which would be discernible from the text, legislative history, or statutory purposes of the ADEA. *Gilmer*, 500 U.S. at 26-27. Neither the Employees nor their amici make any such showing.

The Employees and their amici attempt without success to supply evidence of such legislative intent from 29 U.S.C. § 626(f) and Section 118 of the 1991 Civil Rights Act. Pub. L. 102-166, 105 Stat. 1071. First, the Employees argue that Section 626 of the ADEA requires waivers of a judicial forum to be made by the affected individual himself. Resp. Br. 3, 13. That is flatly wrong.

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implement a *Gilmer*-like arrangement with its union-represented employees. U.S. Br. 30-31 n.12; *see also* NAA Br. 26 n.8. But if a union and employer can agree to a *Gilmer*-type system as a condition of employment, there is no logical basis for arguing that a union lacks authority to agree directly to an arbitral forum.

Every court of appeals to address the issue has held that Section 626 applies only to the waiver of substantive ADEA rights, not forum selection clauses. *See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 170 F.3d 1, 12-13 (1st Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 181-82 (3d Cir. 1998); *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660-61 (5th Cir. 1995). *Gilmer* itself refutes the argument, for if waivers of procedural rights could not be signed before the claims arose, on the Employees' interpretation of 29 U.S.C. § 626(f)(1)(C), then even individual pre-dispute agreements to arbitrate would never be enforceable. In fact, *Gilmer* considered Section 626 and found that Congress did not preclude arbitration "even in its recent amendments to the ADEA." 500 U.S. at 29 & n.3.

Section 118 of the Civil Rights Act of 1991 is similarly unavailing. The Employees rely on snippets of legislative history that purportedly show that Congress precluded any waiver of the right to a judicial forum. Resp. Br. 32. But nothing in the provision itself supports that view, and an unambiguous text does not permit resort to legislative history at all, much less inconsistent legislative history, as here. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989); *Rosenberg*, 170 F.3d at 11. Every court of appeals considering the issue has rejected the contention that Congress sought in Section 118 to preclude arbitration. *See, e.g., EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 752-53 (9th Cir. 2003) (en banc) (noting that "it would be ironic to interpret statutory language encouraging the use of arbitration and containing no prohibitory language as evincing Congress' intent to preclude arbitration of Title VII claims"); *Rosenberg, supra*;

Seus, 146 F.3d at 182-83 n.1 (rejecting reliance on the House Report language cited by the Employees and the Solicitor General here in view of "ample legislative history to support a straightforward reading of the text of § 118"); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 205-06 (2d Cir. 1999); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881-82 (4th Cir. 1996).

Given the absence of a negative Congressional intent in the statutes, it comes as no surprise that this Court's cases do not preclude collectively bargained arbitral promises. Neither *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), nor *Connecticut v. Teal*, 457 U.S. 440 (1982), Resp. Br. 33, remotely involved questions of union representation. In both cases, practices were found to violate Title VII's substantive guarantees, not to bar procedural devices such as forum selection clauses. Nor does the fact that the ADEA furthers important social policies, Resp. Br. 34-35, have any bearing on whether a union has the power to select the forum for ADEA claims. *Gilmer* rejected that very argument, holding that there is no "inherent inconsistency" between such social policies and the enforcement of agreements to arbitrate. 500 U.S. at 27. Indeed, the Court commented that arbitration may actually *further* those policies. *Id.* at 28.

In short, the Employees have completely failed to meet their burden of showing that Congress intended to preclude enforcement of collectively-bargained agreements for arbitration of ADEA claims, at the same time that it permitted, and indeed encouraged, arbitration generally, including as to ADEA claims.

C. The Union Here Agreed To A Dispute Resolution Process, To Which The Employees Consented.

The same result is reached if the collectively-bargained agreement for arbitration of statutory discrimination claims is seen not as a waiver of procedural rights but simply as a dispute resolution process jointly adopted by an employer and union. Under this view, the contractual provision for arbitration of discrimination claims is no different from a *Gilmer*-approved provision adopted unilaterally by an employer as a condition of employment, except that the employees have a significant say – through their bargaining agent – in determining whether arbitration will be require and designing the applicable procedures. Lower courts have generally held that non-union employees can demonstrate their consent to a company's arbitration policy, under *Gilmer*, by accepting or continuing work subject to that policy.[7] Individual union members, often (as here) accorded the right to vote on the terms of a collective bargaining agreement, may reject or consent to forum selection clauses in much the same way.

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[7] *See, e.g., Tinder v. Pinkerton Sec.*, 305 F.3d 728 (7th Cir. 2002); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005); *Seawright v. Am. Gen. Fin. Servs. Inc.*, 507 F.3d 967 (6th Cir. 2007) (holding that an employee's continuation of employment after the effective date of the arbitration program constituted a knowing and voluntary acceptance of a contract to arbitrate, even where employee did not actually sign a waiver); *Armstrong v. Assoc. Int'l Holdings*, 242 F. App'x 955 (5th Cir. 2007); *Brennan v. Cigna Corp.*, Nos. 06-5027 & 06-5124, 2008 U.S. App. LEXIS 13045 (3d Cir. June 18, 2008); *but see Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007).

Contrary to the position taken by amicus National Academy of Arbitrators, Professor Theodore St. Antoine, a close student of the issue over many years and ~~past~~ President of the Academy, has noted that arbitral clauses in collective bargaining agreements are no less "'knowing' and 'voluntary' than what occurs when an employer presents a new or incumbent individual worker, like Robert Gilmer, with a mandatory arbitration agreement on a take-it-or-leave-it basis." Theodore J. St. Antoine, *Gilmer In The Collective Bargaining Context*, 16 Ohio St. J. on Disp. Resol. 491, 503-04 (2001) (footnotes and citations omitted). In an article written while this case was pending, Professor St. Antoine reviewed recent empirical studies of both unionized and non-unionized employees, and concluded that employees do considerably better in arbitration than litigation, and that "[e]mployees, particularly those at the lower end of the pay scale, will find readier access to effective relief in arbitration" than litigation. Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 796 (2008).

The AFL-CIO and Change To Win also suggest that an employee can effectively consent to substitute arbitration for litigation, consistent with *Gilmer*, by requesting arbitration of his statutory discrimination claim through the collectively-bargained grievance procedure. AFL-CIO/CTW Br. 16. Of course, that is precisely what the Employees, with their private counsel, did here in submitting their ADEA claims to the contractual grievance procedure. *See* JA 31, 95. Their consent to the process is no less effective merely because, after the Union decided not to prosecute those claims, they chose to commence this action in federal court in lieu of proceeding in arbitration on their own with private counsel. *See, e.g.*, *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994) ("Once a claimant submits to the authority of the arbitrator and pursues arbitration, he cannot suddenly change his mind and assert lack of authority.").

III. THE EMPLOYEES ARE BOUND BY THE AGREEMENT TO ARBITRATE CONTAINED IN THE CBA.

In addition to arguing that collectively-bargained promises to arbitrate are categorically unenforceable, the Employees and their amici assert that as a matter of contract interpretation, the arbitration provision in the CBA simply does not apply to them. Resp. Br. 2, 41-47. Relying on Local 32BJ's one-sided, extra-record account of the "bargaining history," 32BJ Br. 4-14, they insist that the arbitral promise does not cover either individual employees or their claims, and that the Union can unilaterally choose between arbitrating those claims or leaving them to be litigated in court. This contrived argument was not raised in either of the courts below, flies in the face of the express premises of both the District Court's and Second Circuit's decisions, ignores New York State cases interpreting the arbitration clause, and is a matter for the arbitrator to decide, not the courts. It is also wrong.

To begin with, this contractual argument was not raised below. Both the District Court and the Second Circuit accepted that the arbitration clause clearly and unmistakably sought to waive the Employees' right to a federal forum, holding that the agreement was unenforceable – a ruling that would have been unnecessary if in fact the clause did not even purport to bind the Employees. *See* Pet. App. 21a; Pet. App. 8a-11a. The Employees' only ground for defending the denial of the motion to compel, before the District Court and the Second Circuit, was that collectively-bargained arbitration agreements are never enforceable as a matter of law. Indeed, they disavowed the very argument advanced here, by expressly conceding that "the waiver is sufficiently explicit." Br. for Plaintiffs-Appellees in Second Circuit at 9. Having done so, they should not be permitted to advance the opposite argument now. *See, e.g., Rita v. United States*, 127 S. Ct. 2456, 2470 (2007) (issues not raised below will not be considered by the Court); *Heckler v. Campbell*, 461 U.S. 458, 468-69 & n.12 (1983) (arguments for affirmance not raised below will be considered "only in exceptional cases") (internal quotation and citation omitted).

Furthermore, to the extent the Employees now seek to reinterpret the meaning of the CBA, the arbitral agreement here provides that it is a matter for the arbitrator to decide, not the courts – and certainly not this Court in the first instance. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-45 (1995) ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . , so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter."); *AT&T Techs. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649-50 (1986) (same). In this case, the CBA itself provides that the arbitrator shall decide "*all* differences arising between the parties *as to interpretation, application or performance* of any part of this Agreement *and such other issues as the parties are expressly required to arbitrate before him under the terms of this Agreement.*" Pet. App. 43a (emphasis added). Under that broad clause, the question the Employees now raise – whether the provision that arbitration would be the "sole and exclusive remedy" for workplace discrimination claims was individually binding on them – was for the arbitrator alone.

Even if this Court considers the contractual argument asserted by the Employees and their amici, the interpretation they advance is simply wrong. It is crystal-clear that the CBA intends to bind individual employees to arbitrate all their grievances. The Agreement specifies at its outset that it is made between the RAB "and the Union, on behalf of its members." Joint App. in Second Circuit at A160. Article I provides that "[t]he Union obligates itself and its members that they will in good faith comply with all of the provisions." JA 48. The agreement expressly protects "any present or future employee" from violation of specified statutory anti-discrimination provisions, and provides that "[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." Pet. App. 48a. "All such claims" clearly and unmistakably includes and refers to individual employee claims under the ADEA. Ignoring those terms is contrary to the basic rule of contract construction that courts must avoid interpretations that would leave contractual clauses meaningless.

Restatement (Second) of Contracts § 203(a) (1981); *Ladd v. Ladd*, 49 U.S. 10, 28 (1850).[8]

Nor does the "bargaining history" offered up by Local 32BJ, which was neither a party nor an amicus below – and on which the Employees, the Solicitor General, and other amici all leap to rely – demonstrate that the arbitral promise here means anything different from what it says. This offered "history" is neither in the record nor accurate. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) (refusing to consider materials that were not part of the record evidence). Local 32BJ's own submission confirms that the no-discrimination clause was amended in 1999 to make the clause enforceable after *Wright*, *see* 32BJ Br. 13, and the contemporaneous side letter signed by Local 32BJ's chief negotiator stated that although he was personally uncomfortable with limiting a worker's ability to pursue a statutory claim of discrimination to only the arbitral forum, he had agreed to maintain the provision in the CBA. Pet. App. 3a-4a. There is no way to understand those facts other than as reflecting the clear and unmistakable agreement that employees' ADEA claims would be resolved in an arbitral forum, not a judicial one.[9]

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[8] While Petitioners had no occasion to address this issue below, there is far more in the bargaining history and past practice to support their reading of the CBA than the few contractual phrases on which Local 32BJ relies. An arbitrator considering a contention by the Employees that the CBA does not require them to arbitrate statutory discrimination claims, notwithstanding the "no-discrimination" clause and their express concession on appeal that the arbitral promise was "sufficiently explicit," would consider that full bargaining history and past practice. *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives' Assoc.*, 491 U.S. 299, 311 (1989) ("[T]he parties' 'practice, usage and custom' is of significance in interpreting their agreement.") (citation omitted); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("[A] collective bargaining agreement is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."); Robert A. Gorman & Matthew W. Finkin, *Basic Text On Labor Law: Unionization And Collective Bargaining* 733 (2d ed. 2004).

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[9] Further undermining the Employees' version of the bargaining history, New York State courts and administrative agencies have been enforcing the clause since 2000, compelling Union members to arbitrate their discrimination claims. *See, e.g.*, *Lewandoski v. Collins Bldg. Servs.*, No. 104657/00 (Sup. Ct. N.Y. Co. Dec. 6, 2000); *Garcia v. Bellmarc Prop. Mgmt.*, 295 A.D.2d 233 (1st Dep't 2002); *Roman v. Cushman & Wakefield, Inc.*, *Compl. No. M-E-LR-02-1013054-E* (City of N.Y., Comm'n on Human Rights Feb. 14, 2003); *Cocco v. Tudor Realty Servs. Corp.*, Compl. No. M-E-T-04-1015487 (City of N.Y., Comm'n on Human Rights Feb. 27, 2004); *Melesse v. Brown Harris Stevens Residential Mgmt. LLC*, No. 101052/06 (Sup. Ct. N.Y. Co. Nov. 21, 2006); *Sum v. Tishman Speyer Props., Inc.*, 37 A.D. 3d 284, 284 (1st Dep't) ("This union-negotiated waiver of plaintiff's right to a judicial forum to pursue the statutory claims here at issue is 'clear and unmistakable,' and enforceable."), *appeal granted*, 9 N.Y.3d 817 (2007); *McClellan v. Majestic Tenants Corp.*, No. 302489/07, 2008 N.Y. Misc. LEXIS 3850, at *3 (Sup. Ct. Bronx Co. June 27, 2008) ("sole and exclusive" provision is clear, unmistakable, and enforceable); *Odeh v. Brown Harris Stevens Residential Mgmt.*, No. 0119173/06, 2008 WL 169678 (Sup. Ct. N.Y. Co. 2008). Despite the consistent contractual interpretation of these decisions, Local 32BJ never sought to alter the "sole and exclusive" language in any of its *nine negotiations* for successor collective bargaining agreements with the RAB that have taken place since 2000.

On the Employees' reading, no discrimination claims of any Union members would ever need to be arbitrated, and the Union could avoid arbitration of all such claims simply by deciding not to take any of them to arbitration. That construction turns the penultimate sentence of the "no discrimination" clause into a nullity, and is an unsustainable reading of a provision promising the employers that "all such claims" would be subject to arbitration as the "sole and exclusive remedy." Pet. App. 48a. A far more natural, plausible, and sensible reading would understand that provision as giving the Union the right to assert such claims if it chooses to do so, and the Employees the obligation to arbitrate before the contractually-specified Contract Arbitrator, with their own counsel, if the Union chooses not to assert the claim on their behalf. That is the reading the employer and the RAB (who negotiated the clause) have long had, as is demonstrated by state court decisions enforcing the arbitration clause, *see* note 9, *supra*, and confirmed by the telling admission of the Employees' counsel that he had received "repeated requests" for "arbitration *under the Union's collective bargaining agreement*." JA 76 (emphasis added); *see also* JA 46 and Pet. Br. 8 n.3 (request to plaintiffs' counsel to participate in the then-pending initial arbitration).

Equally baseless is the Employees' claim that *Wright* requires not only a "clear and unmistakable" promise to arbitrate discrimination claims but also individual sign-off by the claimant. Resp. Br. 44-46. There is no support in this Court's precedents or the statutes for such a position, and Section 3 of the FAA requires a dispute "referable to arbitration under an agreement in writing for such arbitration," without more. From *Metropolitan Edison* forward, the Court has taught that union waivers of individual rights or a federal judicial tribunal must be clear and unmistakable, but not that the individuals subject to the waivers themselves must sign individual "clear and unmistakable" waivers. *See, e.g., Wright*, 525 U.S. at 79 ("[W]e think any *CBA requirement* to arbitrate . . . must be particularly clear.") (emphasis added); *Metropolitan Edison*, 460 U.S. at 710 ("*[A] union may waive this protection* by clearly imposing contractual duties on its officials . . . .") (emphasis added).[10]

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[10] In any event, courts and arbitrators have broad powers to supply missing terms in arbitration agreements to effectuate the intent of the parties, pursuant to the express authority of the FAA, 9 U.S.C. §§ 4-5, and consistent with the FAA's strong policy favoring arbitration. *See, e.g., Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715 (7th Cir. 1987) (affirming decision to enforce arbitration where court decided who the arbitrators would be, where the arbitration would take place, and what procedures would govern); *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308 (11th Cir. 2005) (failure of mandatory arbitration clause to identify arbitrator, forum, location, or allocation of costs from arbitration did not render clause unenforceable since under 9 U.S.C. § 5 federal district court can supply such terms).

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed, and the case remanded for further proceedings in accordance with the Court's decision.

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BRIEF

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No. 07-581

In the Supreme Court of the United States

14 PENN PLAZA LLC, ET AL., PETITIONERS

v.

STEVEN PYETT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Court granted certiorari on the following question:

Is an arbitration clause contained in a collective bargaining agreement, freely negotiated by a union and an employer, which clearly and unmistakably waives the union members' right to a judicial forum for their statutory discrimination claims, enforceable?

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In the Supreme Court of the United States

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14 PENN PLAZA LLC, ET AL., PETITIONERS

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STEVEN PYETT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the enforceability of a collective-bargaining agreement that purports to waive the rights of employees to bring claims arising under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, in a judicial forum. The Court's decision could also affect claims arising under other federal antidiscrimination statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, the Equal Pay Act of 1963 (EPA), 29 U.S.C. 206(d), and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.* The Equal Employment Opportunity Commission (EEOC) has authority to enforce the

ADEA and the EPA with respect to both public and private employers, and to enforce Title VII and the ADA with respect to private employers. See 29 U.S.C. 626; 29 U.S.C. 633a (2000 & Supp. V 2005) (ADEA); 29 U.S.C. 216(c) (EPA); 42 U.S.C. 2000e-5(a) (Title VII); 42 U.S.C. 12117(a) (ADA). The Attorney General has authority to enforce Title VII and the ADA against public employers, and to enforce USERRA against public and private employers. See 42 U.S.C. 2000e-5(f)(1) (Title VII); 42 U.S.C. 12117(a) (ADA); 38 U.S.C. 4323(a) (USERRA). Accordingly, the United States has a significant interest in the resolution of this case.[1]

STATEMENT

1. a. Petitioner 14 Penn Plaza LLC (the Company) owns and operates a New York City office building in which each of the three respondents worked as a night lobby watchman or night starter before July 2003. J.A. 2-5; Pet. App. 2a. Respondents were directly employed by petitioner Temco Service Industries, Inc. (Temco), which provided maintenance and cleaning services for the building. J.A. 3, 5.

Respondents allege that, in July 2003, they were reassigned to positions in the building that were "substantially less desirable," and, shortly thereafter, the Company contracted with a Temco affiliate to provide new security services and personnel at the building. J.A. 3, 6, 7, 27, 29, 30-31. Respondents were the only building employees over the age of fifty, Pet. App. 4a, and the new night watchmen were much younger and had much less seniority at the building. J.A. 6-7, 8, 81, 88-89, 94. Respondents claim that their reassignments were motivated by age and violated the ADEA as well as state and local laws prohibiting age discrimination. J.A. 10-13.

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[1] The United States has participated as amicus curiae in other cases presenting the question whether a collective-bargaining agreement could waive individual employees' rights to file lawsuits raising federal discrimination claims. See *Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

b. Respondents are members of the Service Employees International Union, Local 32BJ (the Union). J.A. 3-5; Pet. App. 3a. They are covered by a Collective Bargaining Agreement (CBA) between the Union and the Realty Advisory Board on Labor Relations, Inc. (RAB), a multi-employer bargaining association for the New York City real-estate industry that includes petitioners. *Id.* at 3a. The CBA includes the following provision:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, [certain enumerated antidiscrimination laws under New York, New York City, New Jersey, and Connecticut law], or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI [of the CBA]) as the sole and exclusive remedy for violations.

Id. at 48a.[2]

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[2] The Union's brief as amicus curiae (at 5 n.3) notes that the excerpts in the Joint Appendix and Petition Appendix are from a later version of the CBA, but that version is, in relevant part, identical to the version that applied when the events giving rise to this case occurred. See also

As in most CBAs, the Union here retains complete control over the presentation of claims on behalf of covered employees—including claims of discrimination—at both the grievance and the arbitration stages. The grievance stage involves meetings between "representative[s]" of "the Employer" and "the Union." Union Amicus Br. App. 1a (reprinting CBA Art. V.2(a)-(b)). Once a dispute proceeds from grievance to arbitration, the CBA specifically states that "[a]ll Union claims are brought by the Union alone, and no individual shall have the right to compromise or settle any claim without the written permission of the Union." Pet. App. 46a. The arbitrator is to be one of twelve labor arbitrators on a panel that is picked by the Union and the RAB, each of whose services may be terminated by the Union or the RAB upon 30 days' notice. *Id.* at 47a. The fees and expenses of the arbitrator are shared equally by the employer and the Union in most cases and borne entirely by the employer in others. *Id.* at 44a.

c. After their reassignments, respondents asked the Union to file grievances claiming that (1) petitioners violated the CBA's discrimination proscription by reassigning them to less desirable positions on account of their age; (2) petitioners violated seniority rules by failing to promote one of them to a handyman position; and (3) petitioners had failed to rotate overtime equitably in accordance with the CBA. J.A. 8, 30, 31-33. The Union exhausted the grievance procedure on all three claims and requested arbitration. J.A. 8, 33, 51.

In February 2004, soon after the initial arbitral hearing, the Union decided that it would not pursue respon-

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Resp. Br. 6, 8, 44-45 (quoting and citing version of CBA contained in the appendix used in the court of appeals).

dents' age-discrimination claim and withdrew it from the arbitration. J.A. 99. The Union's lawyer informed respondents that, because the Union had consented to the contract for new security personnel with the Temco affiliate, it could not object to respondents' reassignment as being discriminatory. J.A. 36, 83-84, 90, 96-97; Union Amicus Br. 16. In August 2005, after conducting seven additional hearings, the arbitrator denied respondents' seniority and overtime claims. J.A. 49-66.

2. In September 2004—while the arbitration was still proceeding on the other two claims and after respondents had obtained right-to-sue letters from the EEOC (J.A. 9)—respondents filed this suit against petitioners in the United States District Court for the Southern District of New York, alleging that they had been reassigned in violation of the ADEA and state and local laws prohibiting age discrimination. J.A. 10-13; Pet. App. 5a, 14a.

In November 2005, petitioners filed a motion to dismiss, or, in the alternative, to stay the proceedings and compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. 3, 4. Pet. App. 5a, 18a. Petitioners argued that respondents were bound by the CBA to arbitrate their statutory age-discrimination claim. *Id.* at 21a. Although the arbitration of the other two claims had already concluded, petitioners claimed that arbitration could still be conducted on the discrimination claim because they had arranged, after the fact, for an *ad hoc* substitute by securing the Union's "consent[] to the use of the Office of the Contract Arbitrator * * * created under the [CBA] * * * as the forum for [respondents'] private attorney to pursue [their] statutory age discrimination claims, as long as the parties to this lawsuit, and not the Union, pay the costs associated with the arbitration." *Id.* at 41a-42a.[3] Respondents countered that they were not bound by the union-negotiated arbitration agreement and preferred to press their discrimination claims in court. *Id.* at 21a.

The district court denied petitioners' motion to compel arbitration. Pet. App. 13a-22a. It concluded that respondents were not required to arbitrate their claim, because "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." *Id.* at 21a. Pursuant to 9 U.S.C. 16(a)(1), petitioners then brought an interlocutory appeal of the denial of their motion to compel arbitration. Pet. App. 7a.

3. The court of appeals affirmed. Pet. App. 1a-12a. Relying on prior circuit case law, it concluded that the question whether the CBA required respondents to arbitrate their discrimination claim is governed by this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), which allowed an employee to litigate his discrimination claim against his employer under Title VII, despite an arbitration provision contained in a union-negotiated CBA with the employer. Pet. App. 8a.

The court of appeals rejected petitioners' argument that *Gardner-Denver* had been overruled or superseded in relevant part by *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), or *Wright* v. *Universal Maritime Service Corp.*, 525 U.S. 70 (1998). The court determined that each of those decisions continued to recognize a distinction between arbitration agreements negotiated by an individual employee and those negotiated by a union. Pet. App. 8a-10a. In addition, the court observed that the alleged facts of this case "illustrate[]" a reason to distinguish arbitration agreements in individual contracts from those in CBAs: "If * * * the Union refused to submit the wrongful transfer claims to arbitration because the Union had agreed to the new contract [to bring in new security personnel], the interests of the Union and the interests of [respondents] are clearly in conflict." *Id.* at 11a-12a n.5 (citing *Gardner-Denver*, 415 U.S. at 58 n.19).

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[3] Although it was not mentioned in their certiorari-stage briefs and is not in the record, petitioners claim to have lodged with the Clerk a February 2005 fax transmission from respondents' counsel declining to arbitrate respondents' age-discrimination claim. Pet. Br. 8-9 n.3. Petitioners cite nothing (either in or out of the record in this case) indicating that the Union consented to the *ad hoc* arbitration arrangement described in the text before November 2005.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the provisions of the CBA purporting to waive respondents' right to pursue relief in a judicial forum on their federal discrimination claim cannot be enforced.

A. In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court established that a union-negotiated mandatory-arbitration clause in a CBA cannot preclude a covered employee from pursuing a statutory employment-discrimination claim in court. Among other things, that principle accounts for the fact that there is an inherent conflict of interest between the majority of the union and the individual employees it represents, which is especially problematic in cases involving claims of discrimination. *Id.* at 51, 58 n.19. As the Court recognized in *Gardner-Denver*, union-controlled arbitration could allow the "the interests of the individual employee [to] be subordinated to the collective interests of all employees in the bargaining unit," and collectively waiving the employee's right to go to court "would defeat the paramount congressional purpose behind Title VII." *Ibid.*

This Court has repeatedly reaffirmed *Gardner-Denver*'s conflict-of-interest rationale. See *McDonald* v. *City of West Branch*, 466 U.S. 284, 291 (1984); *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981). And when this Court recognized in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that individual employees can be bound by pre-dispute agreements to arbitrate their statutory employment-discrimination claims, it distinguished arbitration agreements made by the individual employees themselves from those contained in union-negotiated CBAs. *Id.* at 35. That distinction is sound and it precludes unions from waiving employees' rights to bring a federal discrimination claim in a judicial forum.

B. The waiver at issue in this case suffers from an additional defect. Even assuming that a union-negotiated CBA could waive individual employees' rights to litigate their employment-discrimination claims, the employees would need at a minimum to retain the ability to control the presentation of their claims in the arbitral forum. Otherwise, the collective interests of the union would be allowed to trump not only the individuals' ability to choose a forum but also their ability to vindicate the substantive interests protected by antidiscrimination statutes. Such a waiver of substantive rights would be inconsistent with this Court's cases under the FAA, see, *e.g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), as well as the text of the ADEA itself, 29 U.S.C. 626(f)(1). The CBA in this case gives the Union the exclusive discretion to decide whether to arbitrate a discrimination claim at all and thus runs afoul of that principle.

C. No statute requires an employee to arbitrate discrimination claims when he has neither agreed to arbitrate them nor has direct control of the arbitral process. In particular, neither the terms of the FAA nor this Court's FAA cases would require arbitration in the circumstances of this case, where an individual's statutory discrimination claim can be arbitrated only at the behest of a union. Nor does Section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1081 (42 U.S.C. 1981 note), support arbitration in this case. Arbitration is not "appropriate," within the meaning of that provision, when, as here, it is both imposed by a CBA and then controlled by majoritarian forces within the union that may override the employees' individual interests and prevent the claim from being subjected to arbitration at all.

D. The policy concerns expressed by petitioners and their amici do not support the imposition of mandatory arbitration under the union's control in the context of this case. Contrary to petitioners' claims, the duty of fair representation cannot adequately protect employees from conflicts between their individual interests and the collective interests of their bargaining unit. See *Barrentine*, 450 U.S. at 742. Moreover, although arbitration indeed has many virtues, and an employee's decision to take advantage of its benefits must be respected, nothing in the general federal policy favoring arbitration compels the subjugation of an individual's decision whether to pursue arbitration to that of a union.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT RESPONDENTS WERE NOT REQUIRED TO ARBITRATE THEIR FEDERAL DISCRIMINATION CLAIM

This case concerns whether, or in what circumstances, individual employees who have not personally agreed to arbitration can be compelled to give up a judicial forum for their statutory discrimination claims by a union-negotiated CBA. This Court's cases point to the conclusion that an individual employee may not be forced to give up a judicial forum for his federal discrimination claim in that manner. See *Alexander* v. *Gardner-Denver Co.*, *supra.* The attempted waiver in this case suffers from an additional defect. It not only would compel respondents to forgo a judicial forum for their federal discrimination claim, but also compel them to surrender to their union the power to determine how—and whether—their claim will be presented in the arbitral forum. Even assuming a union-negotiated CBA could waive a judicial forum for an individual's federal discrimination claim, it could not waive the individual's right to control the arbitration of that claim as well. The decision of the court of appeals should therefore be affirmed.

A. Under This Court's Precedents, Union-Negotiated Clauses Compelling Arbitration Of Statutory Discrimination Claims Are Not Enforceable Against An Individual's Private Right Of Action

This case should be disposed of under the basic principle established by this Court in *Gardner-Denver*, that a union-negotiated mandatory-arbitration clause in a CBA cannot preclude a covered employee from pursuing a statutory employment-discrimination claim in court.

See 415 U.S. at 49-50. That principle follows from the well-founded premise that *an individual's* ability to vindicate federal statutory antidiscrimination rights should not be subjugated to a union's judgment about the best *collective* interests of the employees it represents—either when the union negotiates an arbitration clause in the CBA, or when the union presents or compromises or declines to bring a particular claim through union-controlled grievance-and-arbitration machinery.

1. In *Gardner-Denver*, an employee subject to a CBA alleged that his discharge was the result of race discrimination by the employer. 415 U.S. at 38, 42. The CBA established a grievance-and-arbitration procedure and prohibited "discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." *Id.* at 39. The union invoked the grievance-and-arbitration procedure, but the arbitrator ruled that the employee had been discharged for "just cause." *Id.* at 42-43. The employee then brought suit under Title VII, and the employer argued that the employee was bound by the arbitration procedure established under the CBA and thus precluded from seeking a judicial remedy under Title VII.

This Court held that the employee was entitled to pursue his statutory claim in court, notwithstanding the CBA's arbitration procedure. It rejected the argument that the employee had forfeited or waived his Title VII cause of action by electing and pursuing arbitration. *Gardner-Denver*, 415 U.S. at 49-51. The Court recognized that some kinds of statutory rights "are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain benefits for union members." *Id.* at 51. But it held that the antidiscrimination protections of Title VII "stand[] on plainly different ground," because those rights "concern[] not majoritarian processes, but an individual's right to equal employment opportunities." *Ibid.* Accordingly, the Court held that the waiver of antidiscrimination rights "can form no part of the collective-bargaining process." *Ibid.*

2. *Gardner-Denver* was decided at a time when the suitability of arbitration for statutory claims was viewed with some suspicion, and this Court's decision reflects the view that arbitration was inferior to the judicial process for resolving such claims. See 415 U.S. at 57-58. As this Court has since recognized, "[t]hat mistrust of the arbitral process * * * has been undermined by [its] recent arbitration decisions," as well as by acts of Congress. *Gilmer*, 500 U.S. at 34 n.5 (quotation marks and citation omitted); see *id.* at 29 (citing 29 U.S.C. 626(b) and (c)(1)). Arbitration, including arbitration of statutory claims, is viewed much differently—and more positively—today than in the day when *Gardner-Denver* was decided. But the fact that arbitration is now recognized as a salutary development for resolving claims does not deprive *Gardner-Denver* of all precedential force with respect to the question presented.

The Court's decision in *Gardner-Denver* was also rooted in an alternative, still-legitimate concern that "[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit," even though "harmony of interest between the union and the employee cannot always be presumed, especially where a claim of racial discrimination is made." 415 U.S. at 58 n.19. *Gardner-Denver* thus distinguished between "certain statutory rights related to collective activity, such as the right to strike," which unions could waive on their members' behalf, and "an individual's right to equal employment opportunities" under Title VII, which "can form no part of the [union-controlled] collective-bargaining process since waiver of these [latter] rights would defeat the paramount congressional purpose behind Title VII." *Id.* at 51.

This Court has reaffirmed *Gardner-Denver*'s conflict-of-interest rationale in subsequent cases involving union arbitrations. In *McDonald* v. *City of West Branch, supra,* an employee sought to litigate a claim of racial discrimination under 42 U.S.C. 1983, despite an adverse decision in an arbitration pursued by the employee's union under a CBA. The Court explained that such circumstances present an inherent conflict between the collective interests of the union and the individual interests of the employee, because "under most collective-bargaining agreements the union controls access to the arbitrator, the strategy and tactics of how to present the case, the nature of the relief sought, and the actual presentation of the case." 466 U.S. at 291 n.10 (quotation marks and citation omitted). As the Court put it:

> [W]hen * * * the union has exclusive control over the "manner and extent to which an individual grievance is presented," *Gardner-Denver*, [415 U.S. at 58 n.19], * * * arbitration is an inadequate substitute for judicial proceedings. The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee. See *Gardner-Denver*, [415 U.S. at 58 n.19]; *Barrentine*, [450 U.S.] at 742. Thus, were an arbitration award accorded preclusive effect, an employee's

> opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously.

Id. at 291 (footnote omitted). As *McDonald*'s citations indicate, the Court had also invoked the same rationale in *Barrentine*, in which it allowed an employee to litigate a claim for minimum wage and hour benefits under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, despite having lost in an arbitration under his CBA. See 450 U.S. at 734, 742.[4]

Petitioners attempt to dispense with the *Gardner-Denver* line by suggesting that those cases involved questions about the "collateral estoppel or *res judicata* effect" of a completed arbitration, and assert that *Gardner-Denver* simply establishes a "claim preclusion" rule. Pet. Br. 36, 45. It is true that *Gardner-Denver* involved a completed arbitration and that this case does not, but that factual distinction cannot bear the weight that petitioners ask this Court to place on it. In particular, the fact that Alexander's grievance was arbitrated under the CBA in *Gardner-Denver* played no part in the distinction that the Court drew between a union's waiver of "certain statutory rights related to collective activity, such as the right to strike," and "an individual's right to equal employment opportunities." 415 U.S. at 51. Indeed, the Court made that express by stating in the next paragraph of its decision that "[t]he actual submission of petitioner's grievance to arbitration in the present case does not alter the situation." *Id.* at 52. As this Court recognized in *Wright* v. *Universal Maritime Service Corp.*, 525 U.S. 70 (1998), *Gardner-Denver* held both that an employee does not forfeit his right to pursue a federal discrimination claim in court by pursuing his grievance to final arbitration under a CBA *and* that "[t]he statutory cause of action [in *Gardner-Denver*] was not waived by the union's agreement to the arbitration provision of the CBA." *Id.* at 76. The latter holding is, for the reasons discussed, on point here.

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[4] Although the majority in *Barrentine* allowed an employee to bring statutory wage claims in court, even the dissenters recognized that a statutory guarantee of a "workplace free from *discrimination*, racial and otherwise" is a "fundamental right" that "is not and should not be subject to waiver by a collective-bargaining agreement negotiated by a union." 450 U.S. at 749 (Burger, C.J., joined by Rehnquist, J.).

3. Petitioners put most of their stock in a line of cases exemplified by *Gilmer* v. *Interstate/Johnson Lane Corp.*, *supra*, in which this Court was receptive to the arbitration of statutory claims under contracts that had been executed by the individuals whose claims were to be arbitrated. See Pet. Br. 17-18 (citing *Gilmer*; *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79 (2000); *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, *supra*). But that line of cases is distinguishable from the situation here, where a CBA purports to waive statutory rights *on behalf of* the individual (and in spite of the individual's own preference). In the *Gilmer* situation, the conflict of interest recognized in *Gardner-Denver* is not overriding because ultimately the individual himself may decide whether to agree to a waiver of his statutory rights.

Indeed, in *Wright*, this Court itself observed that there is "assuredly * * * support in the text of *Gilmer*" for a continued distinction between a waiver of federal forum rights in "union-negotiated CBAs" and a waiver of such rights in "individually executed contracts." 525 U.S. at 77; see also *Livadas* v. *Bradshaw*, 512 U.S. 107, 127 n.21 (1994) (explaining that *Gilmer* "emphasized its basic consistency with our unanimous decision in [*Gardner-Denver*]" by distinguishing *Gardner-Denver's* reliance on, *inter alia*, "the concern that in collective-bargaining arbitration, the interests of the individual may be subordinated to the collective interests of all employees in the bargaining unit") (quotation marks and citation omitted).

4. Petitioners argue (Br. 21) that, "under well-established principles of labor law, [the CBA] is binding on [r]espondents as if they had signed it themselves." That is incorrect. The Union is empowered by the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, to bargain on behalf of employees it represents with respect to "pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. 159(a). But even in the context of *labor* rights, this Court has recognized that unions may not be permitted to bargain away the rights of individuals when the unions have a "self-interest" that differs from the interests of employees. See *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974) (explaining that a union's ability to waive employees' "rights in the economic area" does not allow it to impair the employees' choice of their bargaining representative, in part because the incumbent union has a "self-interest of its own to serve"); see also Resp. Br. 21-23; Nat'l Acad. of Arbitrators (NAA) Amicus Br. 22 n.6.

Moreover, petitioners do not cite any labor-law cases that allow unions' NLRA bargaining power to override the distinction between individual antidiscrimination rights and collective economic rights that was recognized in *Gardner-Denver*, *Barrentine*, *McDonald*, and *Gilmer*. Petitioners claim that "[t]his Court has already held that unions may waive individual * * * statutory protections against discrimination." Pet. Br. 23; see also *id.* at 41-42. That argument, however, is based on a mistaken understanding of *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983). In *Metropolitan Edison*, this Court held that a union could waive the right of union officials *granted by the NLRA itself* to be free from antiunion discrimination if the CBA clearly and unmistakably binds union officials to take affirmative steps to end an unlawful work stoppage and they fail to do so. *Id.* at 697-698, 706, 708-709. In reaching that conclusion, the Court stressed that the "statutory protection" in question was "closely related to the economic decision a union makes when it waives its members' right to strike." *Id.* at 706, 707. In addition, the Court expressly distinguished *Gardner-Denver* as involving a statute other than the NLRA that protects an individual right, rather than "contemplat[ing] that individual rights may be waived by the union." *Id.* at 707 n.11.

The rights protected by the ADEA are by no means the kind of "rights related to collective activity, such as the right to strike," that unions may waive on their members' behalf under the rationale of this Court's prior cases. *Gardner-Denver*, 415 U.S. at 51. Allowing the Union to waive the antidiscrimination protections of the ADEA would "defeat the paramount congressional purpose behind" that statute, *ibid.*—just as it would with respect to Title VII (*Gardner-Denver*) and Section 1983 (*McDonald*). Cf. *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 412 (1988) ("[N]otwithstanding the strong policies encouraging arbitration, 'different considerations apply *where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.*'") (quoting *Atchison, Topeka & Santa Fe Ry.* v.

Buell, 480 U.S. 557, 565 (1987)). Accordingly, the waiver at issue is not enforceable against respondents.

B. Even If A CBA Could Waive An Employee's Right To A Judicial Forum For A Statutory Discrimination Claim, The Employee Must At A Minimum Retain The Ability To Control The Presentation Of Such A Claim In The Arbitral Forum

As the court of appeals recognized (Pet. App. 11a n.5), petitioners' reading of the CBA would not only allow the Union to select a non-judicial forum for respondents' individual statutory discrimination claims, but also to determine whether or to what extent those claims will be brought at all in the non-judicial forum. Indeed, in this case, the Union-negotiated CBA prevented respondents from using the CBA's arbitral machinery to resolve their statutory claim against petitioners, and petitioners and the Union have offered only the use of an *ad hoc* extra-contractual process (which is itself seriously flawed) to arbitrate that claim. As a result, even assuming a CBA could ever waive an individual's right to a judicial forum for a federal discrimination claim (which, for the reasons discussed above, it may not), the particular waiver at issue in this case would still be unenforceable.

1. A union's pre-dispute waiver of not only the right to a judicial forum but also the right to control the presentation of a claim to an arbitral forum is effectively a prospective waiver of *substantive* rights or claims under antidiscrimination statutes, because a union may decide to pursue no remedy at all on behalf of an employee, even in an arbitral forum. *Gardner-Denver* expressed disapproval of such waivers. See 415 U.S. at 51 (holding "there can be no prospective waiver of an employee's

rights under Title VII"). And as petitioners concede, *Gilmer* reaffirmed that "substantive guarantees of federal anti-discrimination law are not waivable." Pet. Br. 37; see *Gilmer*, 500 U.S. at 28 (relying on the fact that "the prospective litigant may vindicate [his or her] statutory cause of action in the arbitral forum") (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 637).

Moreover, with respect to the specific statutory claim in this case, Congress has provided that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. 626(f)(1). Under that provision, the extensive delegation of authority to respondents' Union to decide whether their claim would even be advanced would not be valid. The combination of waiving the employees' entitlement to a judicial forum and refusing to bring their claim in a non-judicial forum is not simply a procedural decision. It effectively contracts away the employees' substantive rights under the ADEA, and the resulting waiver of their ability to bring a claim does not satisfy the statute's minimum standards for establishing that the waiver was "knowing and voluntary." Among other things, to be valid under the ADEA, such a waiver would need to be part of an agreement between "*the individual* and the employer"; it could apply only to claims that arose *before* the date of the waiver; and there would need to be "consideration" for the waiver. 29 U.S.C. 626(f)(1)(A), (C), and (D) (emphasis added). The waiver here meets none of those requirements.

2. Rather than defend the Union's refusal to carry respondents' discrimination claim to the conclusion of the CBA's grievance-and-arbitration procedure, petitioners attempt to elide the conflict of interest in this case by arguing that respondents are bound by the gen-

eral proposition that they will arbitrate claims under the CBA (including discrimination claims), but not by the specific form of arbitration dictated by the agreement itself. Thus, they insist that "*an* arbitral forum * * * remains available to [respondents]," Pet. Br. 39 (emphasis added); see also *id.* at 13, 16, 40, 41—even though that forum is not the one described in the CBA.

Even assuming that the extra-contractual, *ad hoc*, and post-dispute arbitral arrangement manufactured between the employer and the Union would qualify as an adequate arbitral forum, the post-dispute creation of such a forum cannot satisfy this Court's holding in *Wright* that any arbitration clause waiving union members' rights to litigate their statutory discrimination claims must be "clear and unmistakable" in the text of the CBA. 525 U.S. at 79-80. Indeed, in this case, the alternative arrangement not only fails to be unmistakable in the CBA; it is not even contained in the CBA. And it is *inconsistent with* the terms of the CBA, which purport to establish a different arrangement as the *only* way that disputes under the CBA will be arbitrated. See Pet. App. 45a ("The procedure *herein outlined* in respect to matters over which the Contract Arbitrator has jurisdiction shall be *the sole and exclusive method* for the determination of all such issues.") (emphases added).[5]

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[5] Even assuming that the affidavit from the Union's counsel (Pet. App. 41a-42a) could be found to reflect a written agreement on respondents' behalf, and that the Union's counsel could in such circumstances make a binding commitment on behalf of respondents, the affidavit does not by its own terms *require* respondents to arbitrate their discrimination claims, or represent that they will do so. Instead, it provides only the Union's consent to the alternative arrangement—and conditional consent at that ("as long as the parties * * * pay the costs").

Petitioners' amici do not appear to contend seriously that respondents are faced with the dilemma of choosing between entrusting control over their arbitration to the Union and accepting the extra-contractual arbitral forum offered by petitioners. The Chamber of Commerce discounts "generalized attacks on the ability of unions to be faithful agents for bargaining unit employees in the arbitration process," Amicus Br. 13 (quotation marks omitted), and it hypothesizes that, in some "cases, the union may step aside to relinquish control of the arbitration process in favor of members who are able to attract private counsel," *id.* at 12, but it never squarely addresses what should happen under the facts of this case, in which the union refused to allow the discrimination claim to be arbitrated under the processes prescribed in the contract. The Chamber does assume that a "predispute agreement[]" cannot effect a waiver under which "'the prospective litigant'" may not be able to "'vindicate [his or her] statutory cause of action in the arbitral forum.'" *Id.* at 8 (quoting *Gilmer*, 500 U.S. at 28). Yet that is of course the situation that respondents face under the terms of the CBA. See also Equal Employment Advisory Council (EEAC) Amicus Br. 5, 13.

3. Petitioners' attempt to minimize as "too speculative" the "risk" of a conflict between the collective interests of the bargaining unit and the individual interests of respondents is also unavailing. Pet. Br. 41 (quoting *Green Tree Fin. Corp.-Ala.*, 531 U.S. at 91). Indeed, the attempt is belied by the very facts of this case. The Union decided it was in the best interest of its collective membership to support the new security contract. When three individual employees alleged that the same contract led to violations of the ADEA, the Union refused to support their claims. Having agreed to the

deal, the Union believed it could not challenge that deal by pursuing respondents' ADEA allegations. The Union's lawyer specifically told respondents as much. J.A. 36, 83-84, 90-91, 96-97; Union Amicus Br. 16. The Union then refused to allow respondents' statutory claim to be arbitrated under the CBA. Consequently, the CBA did not allow for "effective[] * * * vindicat[ion]" of respondents' "statutory cause of action in the arbitral forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 637).

C. No Statute Requires An Employee To Arbitrate Claims When He Has Neither Agreed To Arbitrate Nor Has Direct Control Over The Arbitration Of His Claims

1. Petitioners repeatedly assume or assert (Br. 1-3, 10, 12, 16-18, 21, 26, 30-33, 36, 37, 39, 40, 45) that the FAA applies to this case. In *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001), this Court held that the exemption of "contracts of employment" from the FAA (9 U.S.C. 1) applies only to transportation workers. In the wake of *Circuit City*, the courts of appeals remain divided on the question whether arbitration clauses in CBAs are covered by the FAA, or just by Section 301 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 185.[6] That question, which this Court declined to

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[6] Compare *International Ass'n of Machinists & Aerospace Workers Local Lodge 2121* v. *Goodrich Corp.*, 410 F.3d 204, 207 n.2 (5th Cir.) (citing cases holding that the FAA does not apply to CBAs), cert. denied, 546 U.S. 1015 (2005), with *Smart* v. *International Bhd. of Elec. Workers, Local 702*, 315 F.3d 721, 724-725 (7th Cir. 2002) (holding that both the FAA and Section 301 apply to CBAs). See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting) (agreeing with majority's implicit holding that the FAA does not apply to arbitration clauses in CBAs); *Elkouri & Elkouri: How Arbitration Works* 49 n.11, 54 (Alan Miles Ruben ed., 6th ed. 2003)

address in *Wright*, see 525 U.S. at 77 n.1, was not addressed by the courts below and consistent with its customary practice the Court should decline to resolve the question in the first instance here. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).[7]

In any event, the FAA's general policy in favor of arbitration—one refrain of petitioners' argument (Br. 12, 18)—is already paralleled by the federal policy in favor of arbitration that independently applies to CBAs under Section 301 of the LMRA, and this Court has already acknowledged that the FAA may provide "guidance" for "fashion[ing] rules of federal common law

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(noting that this Court's decision in *Circuit City* "did not address the issues relating to the application of the [FAA] in the context of a dispute arising under a collective bargaining agreement"; "[w]hether the FAA applies to arbitrations conducted under collective bargaining contracts is * * * an unanswered question").

[7] The Union's amicus brief suggests (at 3 n.2) that, because petitioners' interlocutory appeal was predicated on the denial of a motion to stay proceedings and compel arbitration under the FAA, the court of appeals must have assumed for jurisdictional purposes that CBAs are covered by the FAA. The court of appeals, however, has previously concluded that the FAA does *not* apply to suits brought under Section 301 of the LMRA, see *Coca-Cola Bottling Co.* v. *Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 54-56 (2d Cir. 2001), and it did not say anything to the contrary in this case. The district court's order *did* deny a motion to compel arbitration, and it was thus immediately appealable under the terms of 9 U.S.C. 16(a)(1). The court of appeals could have affirmed that denial on any of several alternative grounds (*e.g.*, because the FAA does not apply to CBAs, because the arbitration clause here is unenforceable under circuit precedent, because as a factual matter respondents did not actually agree to arbitration or did not agree to arbitration of these claims, etc.). There does not appear to be any jurisdictional significance to the order in which the court of appeals chose among such reasons for affirming the denial of the motion to compel.

* * * under the federal labor laws." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987); see Pet. Br. 26 n.11 (acknowledging that "this Court has looked to both statutes interchangeably in describing the broad federal policy favoring arbitration"). Accordingly, regardless of whether the FAA applies to the CBA at issue, the FAA still provides guidance here.

Whether the FAA applies directly or as guidance, neither the terms of the FAA nor this Court's FAA cases would require arbitration under the circumstances of this case, where an individual's statutory claims must be arbitrated—and can *only* be arbitrated—at the behest or sufferance of his union. As this Court has explained, the FAA does not define the scope of an agreement or determine who is a party to that agreement. Instead, the FAA reinforces the terms of private contracts *between the contracting parties*. See *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *Mitsubishi Motors Corp.*, 473 U.S. at 628. It is therefore not surprising that this Court has not used the FAA to enforce a forum waiver granted vicariously by someone other than the party whose claim is to be heard in a non-judicial forum, and that petitioners must look beyond FAA jurisprudence to "principles of *labor law*" to argue—incorrectly—that the arbitration clause is "binding on [r]espondents as if they had signed it themselves." Pet. Br. 21 (emphasis added).[8]

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[8] As discussed above, see pp. 16-18, *supra*, the NLRA and this Court's labor-law cases do not establish any such waiver, since, *inter alia*, *Metropolitan Edison* recognized *Gardner-Denver* as establishing that, under the NLRA, unions cannot waive rights against discrimination that are granted to employees by statutes other than the NLRA.

The arbitration clause in the CBA also runs afoul of the FAA for a separate reason. This Court has repeatedly explained that, under the FAA, a party that "agree[s] to arbitrate a statutory claim * * * does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.*, 473 U.S. at 628; accord *Preston* v. *Ferrer*, 128 S. Ct. 978, 987 (2008); *Gilmer*, 500 U.S. at 26, 29. See also Pet. Br. 13, 24, 37. That foundation of FAA jurisprudence is transparently inapplicable in a case such as this one, where the CBA requires employees to forgo not only their right to a judicial forum but also their right to determine whether their claims will be presented in the arbitral forum at all.

2. Petitioners and one of their amici also seek (Pet. Br. 20 n.8; EEAC Amicus Br. 9 n.2) support from Section 118 of the Civil Rights Act of 1991. It provides: "Where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including * * * arbitration, is encouraged to resolve disputes arising under [Title VII, the ADEA, and 42 U.S.C. 1981]." Pub. L. No. 102-166, § 118, 105 Stat. 1081 (42 U.S.C. 1981 note); see also 42 U.S.C. 12212 (materially identical provision governing the ADA). Congress is presumed to be aware of this Court's cases when it legislates. See *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 792, 804 n.4 (1998) (declining to depart from "the limits of employer liability" under Title VII expressed in a prior case because Congress chose to leave those limits "intact" in the Civil Rights Act of 1991). Accordingly, when Congress enacted that statute, it had every reason to believe, based on the precedents discussed above, that

arbitration was neither "appropriate" nor "authorized by law" in the circumstances of this case.

The legislative history bears that out. As the House Judiciary Committee explained:

> The Committee emphasizes * * * that the use of alternative dispute mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of *a collective bargaining agreement* or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*

H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 41 (1991) (emphasis added); see also H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 97 (1991) (same statement in report by House Education and Labor Committee).[9]

As Judge Posner has explained for the Seventh Circuit, arbitration "is *not* appropriate when it is not agreed to by the worker but instead is merely imposed by a collective bargaining agreement that he may have opposed." *Pryner* v. *Tractor Supply Co.*, 109 F.3d 354, 363, cert. denied, 522 U.S. 912 (1997). And arbitration is doubly inappropriate when, as here, it is both imposed and then controlled by majoritarian forces within the union that may override the employees' individual interests and refuse to arbitrate at all.

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[9] The legislative history for Section 513 of the ADA (42 U.S.C. 12212) is to the same effect: "It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA." H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990).

Accordingly, Section 118 cuts against petitioners' claim that respondents' age-discrimination claim had to be arbitrated and directly refutes their assertion (Br. 26-27) that "there is nothing in the ADEA's text or legislative history demonstrating that Congress distinguished between promises to arbitrate ADEA claims depending on whether individual employees agreed to them or they were agreed to in collective bargaining."[10]

D. The Policy Concerns Expressed By Petitioners And Their Amici Do Not Justify Any Different Result

Petitioners and their amici argue that the duty of fair representation will adequately protect employees from the inherent conflict between collective and individual interests. They also extol the virtues of arbitration as an efficient means of dispute resolution—even in cases involving employment discrimination—and argue that compelled arbitration in this context would foster parity between union-represented and unrepresented employees. Those policy concerns, however, do not alter the result called for by this Court's precedents and Congress's actions, as discussed above.

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[10] The provision of the ADEA defining what constitutes a "knowing and voluntary" waiver of rights under the ADEA underscores that Congress has distinguished between individual and collective waivers when the effect of a collective waiver goes beyond that of a forum-selection clause and threatens to deprive the employee of the right to bring a claim at all. As discussed above, see p. 19, *supra*, that provision expressly requires, *inter alia*, that a waiver be "part of an agreement between the individual and the employer." 29 U.S.C. 626(f)(1)(A).

1. Petitioners and amicus Chamber of Commerce claim (Pet. Br. 42; Amicus Br. 11) that the answer to the conflicts between collective and individual interests is the duty of fair representation that unions owe to represented employees. As respondents explain (Br. 38-41), however, suits to enforce the duty of fair representation are insufficient to safeguard non-labor, non-collective rights like those granted to individual employees by the federal antidiscrimination statutes. Indeed, even "hybrid" suits against both the employer and the union (not discussed by respondents) are fundamentally inadequate because an employee can obtain *none* of the benefits of a successful suit against the employer for breach of the CBA unless the union is also found to have breached its duty of fair representation.[11] NAA Amicus Br. 21. That dynamic systematically overprotects employers because the regime for enforcing the unions' duty is "highly deferential" to their judgments about what is in the general interest of represented employees. *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 78 (1991). That is true not just when the union negotiates the terms of a CBA, but also in the labor arbitrations that serve as a continuation of the collective-bargaining process. *Id.* at 77.

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[11] A "hybrid" suit includes both a claim against the employer for breach of the CBA and a claim against the union for breach of the duty of fair representation. See *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 164-165 (1983); *Bowen* v. *USPS*, 459 U.S. 212, 218 (1983) ("[A]n employee * * * who proves that his employer violated the labor agreement and that his union breached its duty of fair representation[] may be entitled to recover damages from both the union and the employer."); see also Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law: Unionization and Collective Bargaining* § 30.10 at 1012-1013 (2d ed. 2004) (describing potential for injunctive relief against both employer and union).

Accordingly, this Court has already concluded that fair-representation suits are inadequate to protect statutory rights against discrimination. As *Barrentine* explained, a union may—"without breaching its duty of fair representation"—decide not to pursue an employee's "*meritorious*" claim in the grievance-and-arbitration process for a host of reasons owing to the collective rather than the individual good. 450 U.S. at 742 (emphasis added). Such reasons could include simple decisions about the allocation of scarce union resources or even the union's honest belief that pursuing a particular claim at a particular time might "jeopardize its strategic relationship to the company." NAA Amicus Br. 20. Nothing in the FAA or in *Gilmer* contemplates that an individual's ability to bring his statutory claim in a non-judicial forum can permissibly be made contingent upon such judgments by others.

2. Taking their cue from this Court's decisions under the FAA, petitioners (Br. 27-30) and their amici (Chamber Amicus Br. 14-17; EEAC Amicus Br. 12-14) describe some of arbitration's comparative benefits as a method of dispute resolution. In the employment context in general, arbitration indeed has many virtues, as this Court and Congress have recognized. As respondents (Resp. Br. 25-26, 48 & n.14) and the National Academy of Arbitrators (Amicus Br. 14-16) point out, however, there is reason to believe that the form of *labor* arbitration established in the CBA may not be—as *employment* arbitration can be—optimal for the resolution of individual discrimination claims, especially when those claims are not supported by the Union.

In any event, whatever the relative policy merits of arbitration for resolving the discrimination claim in this case, federal policy in favor of arbitration is not so paternalistic as to compel it in the absence of an agreement to arbitrate by the individual himself. The decision about whether to arbitrate (and whether to use a variant of labor arbitration rather than employment arbitration) should be made by the parties, and not forced on them by a union. Many individuals may (no doubt for good reason) choose to avail themselves of an arbitral rather than judicial forum, and that choice should be respected. But nothing in the general federal policy favoring arbitration compels the subjugation of an individual's decision whether to pursue arbitration to a union.

3. The EEAC contends (Amicus Br. 14) that the court of appeals has created an "anomaly in employment law by rendering it virtually impossible for union-represented employees * * * to exercise the same basic right that unrepresented employees * * * have enjoyed since *Gilmer*" to benefit from arbitration "with respect to statutory discrimination claims." But this case is not like *Gilmer*, because the employees have not agreed to arbitrate. Unlike the employer in *Gilmer*, see 500 U.S. at 23, petitioners have not made such an agreement a condition of employment. To the contrary, as the Union has explained (Amicus Br. 11-12), petitioners' negotiating representatives abandoned an attempt to do so in 2000. They specifically sought to secure consent from respondents' union for making an agreement to arbitrate a condition of employment (with which individual employees could then have been deemed to consent by continuing to work for petitioners). When the Union did not agree, there was apparently no further effort to secure such an agreement. *Id.* at 12.[12]

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[12] Thus, despite petitioners' suggestion that employers would not need a union's consent to implement such a *Gilmer*-like arrangement

Of course, to the extent that union-represented employees do manifest their individual consent to arbitration, consistent treatment with the employee in *Gilmer* would still require them to have control, at least, over whether and how their claims are presented to the arbitral panel, and also to have some control over the panel itself. Cf. *Gilmer*, 500 U.S. at 30. Neither of those minimum conditions is satisfied here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 2008

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directly with their union-represented employees, Pet. Br. 14, 32 (citing *Air Line Pilots Ass'n, Int'l* v. *Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999), adopted as opinion of en banc court, 211 F.3d 1312 (per curiam), cert. denied, 531 U.S. 1011 (2000)), the facts of this case present no occasion to determine what level of union participation, if any, is necessary to that process. See NAA Amicus Br. 26 n.8 (noting that the question is novel, the analysis is "actually rather complicated," and the NLRB has not yet addressed it).

AMICUS
CURIAE
BRIEF

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No. 07-581

IN THE
Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations and Change to Win file this brief *amici curiae* in support of respondents with the consent of the parties as provided for in the Rules of this Court.[1] The AFL-CIO is a federation of 56 national and international labor organizations with a total membership of 10.5 million working men and women. CTW is a federation of 7 national and international labor organizations with a total membership of 6 million working men and women.

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[1] No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. The courts below correctly denied the petition to order arbitration of the statutory discrimination claims in this case. The collective bargaining agreement upon which the petitioners relied does not constitute an agreement for arbitration binding the respondents to arbitrate rather than litigate their claims. As is typical of such collective bargaining agreements, the grievance-arbitration procedure in that agreement provides only for the arbitration of disputes between the union and the employer and gives the union complete control over which employee grievances will go to arbitration. The union here declined to arbitrate the respondents' statutory discrimination claim, and the respondents are not barred from bringing their claim to court by the union's decision in this regard.

II. A union lacks authority to negotiate agreements for arbitration of statutory discrimination claims on behalf of union-represented employees. As a potential defendant, the union has a conflict of interest that precludes the union from representing the employees as to their choice of forum for bringing statutory discrimination claims. Only the individual employees themselves can enter into agreements for the arbitration of their statutory discrimination claims. The employer is free to bargain directly with the employees over such individual agreements for arbitration but only so long as the agreement is not made a condition of employment and does not otherwise entail a mandatory subject of bargaining.

ARGUMENT

The sole question before the Court at this juncture is whether the courts below should have compelled the respondents, Steven Pyett, Thomas O'Connell and Michael Phillips ("Plaintiff-Employees" or "Employees"), to arbitrate their Age Discrimination in Employment Act claims against the petitioners, 14 Penn Plaza LLC and Temco Service Industries, Inc. ("Defendant-Employers" or "Employers"). That question comes before the Court on an interlocutory appeal from the denial of the Defendant-Employers' petition for an order directing arbitration pursuant to § 4 of the Federal Arbitration Act. 9 U.S.C. § 4.

The Federal Arbitration Act provides for the enforcement of "a written agreement for arbitration" by "an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. The "written agreement for arbitration" on which the Defendant-Employers rely in petitioning for an order compelling the Plaintiff-Employees to arbitrate their ADEA claims is a multiemployer collective bargaining agreement between Service Employees International Union Local 32BJ ("Local 32BJ" or "Union") and the Realty Advisory Board on Labor Relations, Inc. ("Realty Advisory Board" or "Board").

The briefs for the Defendant-Employers and their *amici* are devoted entirely to the question of whether Local 32BJ had the authority to negotiate an "agreement for arbitration" that binds the Plaintiff-Employees to arbitrate their statutory discrimination claims against the Employers. The prior question, which the briefs on the Defendant-Employers' side carefully ignore, is whether the collective bargaining agreement in question is such an agreement for arbitration. *See Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 82 (1998). For the reasons set forth in the brief for Service Employees International Union, Local 32BJ, the terms of the collective bargaining agreement do not create an "agreement for arbitration" that binds the Plaintiff-Employees to arbitrate ADEA claims against the Defendant-Employers.

The point of contract interpretation made in the Local 32BJ brief is dispositive here. We therefore begin by reiterating the point made in that brief, generalizing to show why, in this regard, the Local 32BJ/Realty Advisory Board collective bargaining agreement is typical of collective bargaining agreements in general. Having discussed that dispositive point of contract interpretation, we then go on to discuss the more far-reaching question of union authority tendered by the briefs for the Defendant-Employers and their *amici*.

I. THE COLLECTIVE BARGAINING AGREEMENT IN THIS CASE CANNOT BE CONSTRUED TO BIND THE PLAINTIFF-EMPLOYEES TO ARBITRATE THEIR ADEA CLAIMS AGAINST THE DEFENDANT-EMPLOYERS.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986), quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). In seeking to compel arbitration of the Plaintiff-Employees' ADEA claims, the Defendant-Employers do not contend that there is a bilateral "written agreement for arbitration" directly between the Employees and the Employers. 9 U.S.C. § 4. Rather, the Defendant-Employers rely on a multiemployer collective bargaining agreement between Service Employees International Union, Local 32BJ and various named employer-members of the Realty

Advisory Board, arguing that the Plaintiff-Employees are contractually bound to arbitrate their ADEA claims by the portion of that collective bargaining agreement's no-discrimination clause that provides "[a]ll [discrimination claims] shall be subject to *the grievance and arbitration procedure (Articles V and VI)* as the sole and exclusive remedy for violations." Pet. App. 48a (emphasis added). *See* Pet. Br. 10 & 40.

"[T]he grievance and arbitration procedure" set out in "Articles V and VI" of the collective bargaining agreement provides for the arbitration of "differences arising *between the parties*" to the agreement, i.e., disputes arising between Local 32BJ and any of the covered employers. Pet. App. 43a (emphasis added). That contractual procedure does not empower covered employees to bring statutory discrimination claims against covered employers to arbitration on their own, much less bind covered employees to arbitrate such claims. Rather, that grievance-arbitration procedure empowers Local 32BJ to bring such claims to arbitration as "Union claims," which may only be "brought by the Union alone." *Id.* at 46a.

The collective bargaining agreement here is typical in this regard, as "arbitration in the context of collective bargaining . . . almost invariably means that the union controls the presentation of the . . . issue." *Cole v. Burns International Security Services*, 105 F.3d 1465, 1478 (D.C. Cir. 1997). Where that is so, "the grievance and arbitration procedure can be invoked only by the union, and not by the worker." *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997).

The typical collectively bargained grievance-arbitration provision gives the union exclusive control over the processing of employee claims through the contractual procedures precisely because the "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). "The processing of disputes through the grievance machinery" – including deciding which grievances to present to arbitration and which to settle before arbitration – "is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Id.* at 581. "[T]his settlement process" assures "both sides . . . that similar complaints will be treated consistently" and allows "major problem areas in the interpretation of the collective bargaining contract [to] be isolated and perhaps resolved." *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). "If the individual employee could compel arbitration of his grievance . . ., the settlement machinery provided by the contract would be substantially undermined." *Ibid.* Allowing the individual employee to bypass the union in this way would both "destroy[] the employer's confidence in the union's authority" and subject the settlement of employee grievances to "the vagaries of independent and unsystematic negotiation." *Ibid.*

The instant case presents a textbook example of why empowering employees to use the collectively bargained grievance-arbitration procedure to arbitrate disputes that the union has determined not to arbitrate would disrupt the functioning of the contractual dispute settlement procedures. The ADEA claims advanced by the Plaintiff-Employees in this case challenge an employment action that Local 32BJ agreed to in advance, i.e., the substitution of a security firm for the Plaintiff-Employees' direct employer, Temco, in providing security services to the Penn Plaza building. SEIU Local 32BJ Br. 15. The

Union only agreed to that substitution after receiving assurances that the new provider of security services would not undermine the area wage rates. *Ibid.* Local 32BJ decided not to arbitrate the ADEA claims challenging that action based on its view that the agreement the Union had made with Temco in this regard was not discriminatory. *Id.* at 16 & 19. If that agreement could be attacked by the adversely affected employees through the contractual grievance-arbitration procedure, it would most certainly undermine "the employer's confidence in the union's authority." *Vaca*, 386 U.S. at 191. If the employer could not rely on the Union's agreement to work out such disputes in advance, it would "return[] the [represented employees] to the vagaries of independent and unsystematic negotiation." *Ibid.* "Competing claims" by various groups of employees with different immediate interests "could only set one group against the other," allowing the employer "to divide and overcome them." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 67 (1975).

All that being so, the Defendant-Employers would surely have had good grounds for objecting had it been the Plaintiff-Employees who were seeking an order compelling arbitration of their ADEA claims under Article VI of the collective bargaining agreement. By the terms of the collective bargaining agreement, arbitration is only available to resolve "differences arising between the parties," and claims on behalf of employees may advance to arbitration only as "Union claims . . . brought by the Union alone." Pet. App. 43a & 46a. The grievance and arbitration clauses of the agreement, therefore, clearly do not provide for the arbitration of individual employee claims that the Union has decided to not take to arbitration. And, construing the grievance-arbitration provisions as providing for employees to proceed to arbitration on their own in the face of a contrary decision by the Union would fundamentally undermine the purpose of the contractual grievance-arbitration procedure by making it ineffective as a means for resolving labor-management disputes.

Here, of course, it is the Defendant-Employers who desire arbitration of the ADEA claims attacking the bargain they made with the Union because the Employers view arbitration as a favorable alternative to litigating those claims. But the Employers cannot compel the Plaintiff-Employees to arbitrate claims that the Employees themselves had no contractual right to take to arbitration in the first place. The Plaintiff-Employees can be compelled to arbitrate the ADEA claims in this case only if there is an agreement between themselves and the Defendant-Employers providing for such arbitration. If the grievance-arbitration provisions of the collective bargaining agreement are construed to provide the Employers with a basis for ordering the Plaintiff-Employees to arbitrate in this case that construction will necessarily control any future case in which an individual employee wishes to compel the employer to arbitrate a claim that the Union has refused to advance to arbitration, regardless of whether the claim has a statutory or a contractual basis. Such a construction would seriously undermine the Union's capacity to act as the exclusive bargaining representative of all employees in the unit and, by doing so, would undermine the effectiveness of the grievance-arbitration procedure as a mechanism for the resolution of labor disputes.

This is not to say that statutory discrimination claims can never be effectively decided through the arbitration procedure provided in the collective bargaining agreement. The collective bargaining agreement does give the Contract Arbitrators full authority to decide statutory discrimination claims that are presented to them by the parties to the agreement. Pet. App. 48a. And, the agreement does provide for "the award of the Arbitrator being final and binding upon the parties and the employee(s) involved." *Id.* at 45a. The clear intent of the Agreement, then, is that *an arbitrator's decision* of a statutory discrimination claim will be binding on the Union, the covered employer and the involved employee who brought the underlying grievance. Assuming that neither the method of appointing arbitrators nor some other procedural infirmity (such as complete union control over presentation of the claim) negates the preclusive effect of the award with regard to an affected employee's statutory claim, where an individual employee-grievant has requested that the union arbitrate his statutory discrimination claim through the collectively bargained grievance procedure, we can see no reason why the arbitrator's decision of that statutory claim should not be given the same binding effect on the individual employee who requested the arbitration as an arbitration award issued pursuant to the sort of individual arbitration agreement sanctioned by *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

It does *not* follow, however, that employee-grievants are bound by their union's decision to not bring their statutory claims to arbitration. The Defendant-Employers suggest – but do not go so far as to actually say – that the Plaintiff-Employees *are* bound by Local 32BJ's decision not to arbitrate their ADEA claims. *See* Pet. Br. 42 & n. 19 (discussing an employee's recourse where the Union refuses to arbitrate his statutory discrimination claim). *See also* Chamber of Commerce Br. 11. And, this would seem to be implicit in their reliance on the contractual statement that "the grievance and arbitration procedure (Articles V and VI)" is "the sole and exclusive remedy for violations." Pet. App. 48a. After all, the ADEA claims were advanced through the grievance procedure spelled out in Article V and the Union, which has the exclusive "right to compromise or settle any [employee] claim," *id.* at 46a, did withdraw the ADEA portion of the Plaintiff-Employees' grievance at the arbitration stage. The notion that the Union's decision to drop their ADEA claim in the contractual grievance-arbitration procedure is final and binding on the Plaintiff-Employees is clearly untenable, which is presumably why the Defendant-Employers are unwilling to fully articulate that proposition.

Individual agreements to arbitrate statutory claims are enforceable precisely because, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). In deciding whether to take a grievance to arbitration, a union does *not* act as a "forum" for adjudging statutory claims. Rather, it acts as a collective bargaining representative charged with advancing the best interests of the bargaining unit as a whole. *See Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1357 (10th Cir. 1994). Acting in that capacity, a union may decline to arbitrate a grievance for a host of reasons having nothing to do with the merits of the claim. In addition to weighing the merits of the grievance, the union "has discretion to act in consideration of such factors as the wise allocation of its own resources, its relationship with other employees, and its relationship with the employer." *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 369 (7th Cir. 2003). And, in weighing those various considerations, the union representative does not function as a judge weighing evidence and legal arguments but rather acts on his own investigation of the facts and his own understanding of the bargaining unit's interests.[2]

In sum, the Plaintiff-Employees here are not bound to arbitrate their ADEA claims by the Local 32BJ/Realty Advisory Board collective bargaining agreement nor are they barred from litigating those claims by the Union's decision not to present the claims to arbitration. Since this case is before the Court on an interlocutory appeal from denial of the Defendant-Employers' petition for an order compelling arbitration under the Federal Arbitration Act, it is dispositive that there is *no* "written agreement for arbitration" of the statutory claims in this case between the Employers and the Plaintiff-Employees. 9 U.S.C. § 4.

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[2] Nor would a suit for breach of the duty of fair representation provide an adequate forum for resolution of an employee's statutory claims that his union has refused to take to arbitration. While establishing that the underlying claims have merit is a necessary condition for establishing a breach of the duty of fair representation, *Teamsters Local 391 v. Terry*, 494 U.S. 558, 590 (1990), it is not a sufficient condition, *Vaca*, 386 U.S. at 192-193. Just so long as the union was acting within "a wide range of reasonableness" in declining to arbitrate the employee's claim, the employee will be denied recovery. *Air Line Pilots v. O'Neil*, 499 U.S. 65, 71 (1991). Thus, an employee may prove that his statutory claim against the employer has merit and still be denied recovery in a fair representation suit.

II. A UNION MAY NOT BIND THE INDIVIDUAL EMPLOYEES IT RERESENTS TO ARBITRATE THEIR EMPLOYMENT DISCRIMINATION CLAIMS. IN UNIONIZED WORKPLACES, AS IN NONUNION WORKPLACES, THE AGREEMENT TO SUBSTITUTE ARBITRATION FOR LITIGATION OF STATUTORY CLAIMS MUST BE MADE BY THE INDIVIDUAL EMPLOYEE.

The courts below denied the Defendant-Employers' petition to order arbitration on the ground that Local 32BJ lacks authority to enter into an agreement for the arbitration of statutory discrimination claims on behalf of the employees the Union represents. Pet. App. 8a. While the Court has no need to decide this question of union authority, *see Wright*, 525 U.S. at 77, it may wish to do so in light of the split that has arisen between the Fourth Circuit, which holds that unions do have such authority, and every other circuit to have addressed the question, which hold that unions do not have that authority. Pet. App. 10a-11a n. 4 (citing cases). If the Court does reach this question, we urge that it reaffirm its holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), that unions do not have such authority.

A. The Defendant-Employers' legal argument that unions have authority to agree on behalf of represented bargaining unit members to the arbitration of individual statutory discrimination claims boils down to the simple-minded assertion that, because, as a general matter, "unions may waive individual statutory rights of their members," unions have authority to waive the right of represented employees to bring suit to enforce their statutory discrimination claims. Pet. Br. 23. That represents a fundamental misunderstanding of the scope of a union's authority as the exclusive bargaining agent under the National Labor Relations Act.

The union's authority to waive the statutory rights of represented employees does *not* extend to areas where the "union has [a] self-interest of its own to serve." *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974). Thus, as *Magnavox* holds, a union cannot contractually waive the rights of represented employees in areas where the union's interests clash with those of the employees. *Id.* at 325-26. As Justice Stewart put it in concurring with this part of the *Magnavox* decision, the union's "authority [to waive the rights of represented employees] cannot extend to rights with respect to which the union and the individual employees have essentially conflicting interests." *Id.* at 327.[3] Consistent with that principle, the courts have held that a union cannot bind represented employees to arbitrate breach of the duty of fair representation claims against the union. *See Abrams v. Communications Workers*, 59 F.3d 1373, 1382 & n. 13 (D.C. Cir. 1995); *United Food & Commercial Workers, Local 951 v. Mulder*, 31 F.3d 365, 368 (6th Cir. 1994).

As a potential defendant, the union has a direct conflict of interests with respect to an employee's choice of forum for bringing statutory employment discrimination claims that is essentially the same as the conflict of interest the union has with respect to an employee's choice of forum for bringing fair representation claims. Indeed, union conduct that violates the statutory antidiscrimination laws would also violate the duty of fair representation. *Vaca v. Sipes*, 386 U.S. at 190. The agreement to arbitrate statutory discrimination claims at issue here covers "[*a*]*ll* . . . claims" of "discrimination against any present or future employee." Pet. App. 48a (emphasis added). If the clause is read to require employees to arbitrate all discrimination claims that would include discrimination claims against Local 32BJ as well as claims against the covered employers. While the Plaintiff-Employees did not join Local 32BJ as a defendant in this ADEA case, they might well have done so, since the Union agreed to the employment action they allege to be discriminatory. And, the Plaintiff-Employees' breach of the duty of fair representation suit against Local 32BJ for refusing to take the ADEA claims to arbitration did allege that the Union had "discriminated against [them] because of their age." JA 36.

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[3] *See generally Restatement (Third) of Agency* § 8.03, comment b (2006) ("If an agent acts on behalf of the principal in a transaction with the agent, the agent's duty to act loyally in the principal's interest conflicts with the agent's self-interest. Even if the agent's divided loyalty does not result in demonstrable harm to the principal, the agent has breached the agent's duty of undivided loyalty.").

Given the substance of the antidiscrimination law, an agreement to substitute arbitration of statutory discrimination claims for litigation would be expected to include claims against both the employer and the union. The union may allegedly have violated the antidiscrimination laws in conjunction with the employer. *See Teamsters v. United States*, 431 U.S. 324, 355-56 (1977) (allegedly discriminatory seniority system);*Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987) (intentionally discriminatory refusal to file grievances challenging employer discrimination). And, even where there is no alleged union violation, the union may be a necessary party for purposes of relief on the claims against the employer. *See Teamsters*, 431 U.S. at 356 n. 43. An arbitration system that did not allow an employee to pursue related claims against both the employer and the union in one forum would hardly be a satisfactory substitute for litigation, for "the injured employee [should not] be forced to go to two tribunals to repair a single injury." *Vaca*, 386 U.S. at 187. *See id.* at 187-188 & n. 12.

The dispositive point of *Magnavox*, *Abrams* and *Mulder* is that the union as a potential defendant cannot bind a potential plaintiff as to the forum in which the plaintiff will seek to redress his statutory claims against the union. Given the conflict of interests between a union as a potential defendant and the union-represented employees as potential plaintiffs, the union does not have the authority to make an arbitration agreement binding the employees to arbitrate, rather than litigate, their statutory employment discrimination claims. Each of the union-represented employees must act on his own in making any such agreement.

B. The Defendant-Employers and their *amici* also make a policy argument to the effect that denying unions the authority to negotiate agreements binding represented employees to arbitrate their statutory discrimination claims will preclude arbitration of such claims in the union-represented sectors. Pet. Br. 30-33; Chamber of Comm. Br. 14-18. This is simply not so. Unionized employers may enter into agreements with their employees for the arbitration of statutory claims, just so long as the employee's agreement is voluntary and knowing.

In the first place, as we noted in part I, if an employee requests that the union take his statutory discrimination claim through the collectively bargained grievance procedures to arbitration for a final and binding decision, there are strong grounds for precluding the employee from bringing that same claim to court, provided that the arbitrator had full authority to decide the statutory claim and the arbitration proceedings allowed the employee "effectively [to] vindicate [his or her] statutory cause of action." *Gilmer*, 500 U.S. at 28 (quotation marks and citation omitted).[4] By his request for a final and binding arbitration decision on his statutory discrimination claim through the collectively bargained grievance procedure, the employee has effectively agreed to substitute arbitration for litigation in a way that the law should recognize just as it recognizes *Gilmer* arbitration agreements.

In the second place, if a union does not have authority to enter into an agreement to arbitrate rather than litigate statutory discrimination claims that binds the employees the union represents, it follows that the employer is free to enter into individual agreements for the arbitration of statutory discrimination claims directly with its union-represented employees. *See Air Line Pilots v. Northwest Airlines, Inc.*, 199 F.3d 477, 485 (D.C. Cir. 1999) ("a proposal to trade that which is not one's to give cannot be a mandatory subject of bargaining"). In other words, unionized employers would be free to negotiate with their union-represented employees individual arbitration agreements of the sort sanctioned by *Gilmer*.

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[4] To ensure that an employee may "effectively . . . vindicate [his or her] statutory cause of action," *Gilmer*, 500 U.S. at 28, a statutory claims arbitration procedure should not give the employer undue control over the selection of the arbitrator, *see McMullen v. Meijer, Inc.*, 355 F.3d 485, 492-95 (6th Cir. 2004), and should allow the employee to control the prosecution of his claim before the arbitrator, *see* American Bar Association, *Model Rules of Professional Conduct*, Rules 1.2(a) & 1.4. In the typical collectively bargained grievance-arbitration procedure, the employer and the union jointly select the arbitrator and the union controls the presentation of employee grievances.

An important caveat is that in the unionized employment setting the employer may *not* bypass the union if the negotiations over individual arbitration agreements entail a mandatory subject of bargaining. In particular, a unionized employer may *not* make agreement to the arbitration of statutory claims a condition of employment without first bargaining to impasse with the union over *that* condition of employment.

The union is the "exclusive representative" of all employees in its bargaining unit "for the purposes of collective bargaining in respect to . . . conditions of employment." 29 U.S.C. § 159(a). Terminating workers for refusing to enter into or maintain individual agreements for the arbitration of statutory claims "works a dramatic change in their working conditions (to say the least)." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987). For precisely this reason, any requirement that the employees enter into individual agreements for the arbitration of statutory claims in order to keep their jobs would be one of the "conditions of employment" about which the employer must bargain with the union.

While the union as a potential defendant has a conflict of interests that prevents it from binding the represented employees to arbitrate their statutory employment discrimination claims, there is no such conflict of interests with respect to whether employees will be forced to enter or to maintain such an agreement as a condition of keeping their jobs. The union and the employees have an identical interest in ensuring that the employees will not be faced with the choice of losing their jobs or involuntarily agreeing to arbitration of their statutory claims.[5]

In this case, the Realty Advisory Board recognized that a unionized employer must bargain with its employees' union before it may make individual employee agreements for the arbitration of statutory discrimination claims a condition of continued employment. That is why the Board proposed to Local 32BJ that their collective bargaining agreements contain a provision allowing the covered employers to make such individual employee arbitration agreements a condition of employment. *See* Local 32BJ Br. 11. When Local 32BJ rejected that proposal, the employer-members of the Board understood that they were not free to unilaterally impose that condition of employment on their union-represented employees.

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[5] The extent to which the terms of the individual agreements for arbitration of statutory claims may themselves become a "mandatory subject of bargaining" because the employer proposed to make agreement a condition of employment is a complicated subject which would be governed by a set of highly nuanced rules the National Labor Relations Board has developed. *Compare Regal Cinemas*, 334 NLRB 304, 305 (2001), *with Borden, Inc.*, 279 NLRB 396, 399 (1986).

CONCLUSION

The decision of the courts below should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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IN THE

Supreme Court of the United States

14 PENN PLAZA, LLC AND TEMCO SERVICE INDUSTRIES, INC.,

Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL, AND MICHAEL PHILLIPS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is being filed on behalf of the Chamber of Commerce of the United States of America (the "Chamber").[1] The Chamber is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size and from every industry sector, and region of the country. The Chamber advocates the interests of the business community in courts across the nation in part by filing *amicus curiae* briefs in cases raising issues of national concern to its members. The Chamber has long been interested in promoting a fair employment dispute resolution system that avoids the unnecessary costs, distractions, delays and strategic behaviors characteristic of the civil litigation process.

Through its decisions interpreting the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), this Court has signaled a receptivity to enforcing predispute arbitration agreements between employers and employees—whether they involve claims under an employment contract or under federal or state anti-discrimination and other statutes. The Chamber has been actively involved in encouraging the Court to take these steps, and has filed *amicus curiae* briefs in support of the employment arbitration position adopted in such landmark cases as *Gilmer v. Interstate/Johnson Lane*

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Corp., 500 U.S. 20 (1991), *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

In part as a result of the Court's FAA decisions, many of the Chamber's members have established in-house dispute resolution systems culminating in final, binding arbitration. The empirical studies conducted to date, although still an emerging literature, fairly uniformly give high marks to this effort of U.S. employers to provide a fair alternative to the court system. Contrary to the fears expressed by some in the plaintiff bar, these in-house processes culminating in arbitration have been found to do a laudable job of providing an accessible, prompt mode of redress for many employment disputes.[2]

The instant case illustrates one area, however, where these salutary new developments have not fully taken hold—the arbitration of statutory employment claims in the union-represented sector. Unions represent about 8% of U.S. workers in private companies, and a substantial number of the Chamber's members are signatories to collective bargaining agreements covering segments of their workforce. Because of over-readings of the Court's holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), as exemplified by the decision below, employers and employees alike are deprived of the benefits of an internal system culminating in arbitration for resolving statutory employment claims—even where labor agreements expressly authorize arbitrators to resolve not only contractual claims but also various statutory (including employment discrimination) claims asserted by union-represented employees.

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[2] *See, e.g.*, Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 2003/2004 DISPUTE RES. J. 44; David Sherwyn *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1558 (2005); Richard A. Bales & Jason N.W. Plowman, *Compulsory Arbitration as Part of a Broader Employment Dispute Resolution Process: The Anheuser-Busch Example* (available at www.ssrn.org).

As Petitioners point out, this inability to tap fully the benefits of employment arbitration in settings where unions have bargaining authority may complicate labor relations practices for certain employers. Pet. Br. 32. Because we believe that our members and their employees are adversely affected by the Second Circuit's unwarranted *per se* rule barring enforcement of clear and unmistakable union-negotiated agreements requiring represented employees to pursue their employment claims in arbitration rather than in court, the Chamber has filed this brief in support of Petitioners' position that their motion to compel arbitration should have been granted.

SUMMARY OF ARGUMENT

The court of appeals in this case reaffirmed its *per se* rule that "arbitration provisions contained in a [collective bargaining agreement], which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable." 498 F.3d 88, 93-94 (2d Cir. 2007). The only issue in this case is whether this *per se* barrier is required by law, even where a union-negotiated arbitration agreement expressly authorizes the arbitrator to resolve the dispute in accordance with applicable employment discrimination statutes or other laws and, if violations are found, award statutory (or other available) remedies, as required under *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Unlike the arbitral proceedings convened under the general arbitration clause at issue in *Wright*, the arbitrator here does not sit merely as a "proctor of the bargain." Here, the arbitrator sits to resolve the full range of employment disputes that represented employees may have, whether they raise contractual claims only or also assert claims under federal or state statutes or other laws. In this case, the only waiver plausibly involved is the procedural right to a judicial forum instead of arbitration; the arbitrator is obligated to ensure against waiver of any substantive rights.

Contrary to the reasoning of the court below, this Court's 1974 decision in *Alexander v. Gardner-Denver*, 415 U.S. 36, does not create a *per se* rule barring enforcement of union-negotiated agreements requiring represented employees to take their statutory claims to arbitration instead of court. The Court in that case considered, and properly rejected, an attempt to use a purely contractual arbitration process—where the arbitrator sits only as "the proctor of the bargain," *Gardner-Denver*, 415 U.S. at 53, and may not rely on external law—to foreclose the adjudication of statutory employment claims. Neither the facts of *Gardner-Denver* nor the two cases often cited as its progeny, *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984), dealt with situations where, as here, arbitrators have been given explicit authority to decide the statutory claims of employees in accordance with applicable external laws.

Moreover, the current legal landscape is vastly different from that which led to the 1974 ruling. Disavowing its earlier skepticism of arbitral competence to decide statutory issues, the Court has developed a robust jurisprudence under the FAA, establishing a presumption of arbitrability encompassing nearly all employment disputes, whether sounding in contract, tort, employment discrimination or other statutory law. Although substantive rights can never be waived in predispute arbitration agreements, the Court has made clear that the purely procedural right to a judicial forum can be exchanged for an arbitral forum—thus removing a critical underpinning of *Gardner-Denver* that prospective waivers of the right to a judicial forum are inherently suspect. *See Preston v. Ferrer*, 128 S. Ct. 978, 987 (2008) ("'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum.'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (ellipsis in original). Indeed, *Wright*, *Gilmer*, and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), confirm that a wide range of statutory employment claims can properly fall within the purview of an arbitrator who has been given the authority to resolve disputes in accordance with applicable law.

There may be occasions where unions will not act as faithful agents of their members in the arbitration process. But, given the FAA-based presumption of arbitrability, the presumption of regularity that attaches to the union's obligations as the statutory exclusive bargaining agent, and the union's statutory duty to fairly represent the interests of all represented employees, it cannot be assumed that the interests of the labor union and represented employees will always or even frequently diverge. In the relatively few cases where employees question the fairness of the arbitration process, they should have to demonstrate an evidentiary basis for their claim of bias, which the courts will be able to evaluate, as they do now in cases like *Collins v. New York Transit Authority*, 305 F.3d 113 (2d Cir. 2002).

Finally, strong public policy considerations support enforceability of arbitration promises in the union-represented sector, whether the dispute is one arising under contract law or under employment discrimination statutes. Among these are the considerations of judicial efficiency, employer decision-making efficiency, and employees' access to competent counsel. These considerations, as well as those identified by Petitioners (Pet. Br. 32), weigh heavily toward the practical conclusion that both represented employees and the overall dispute resolution system have little to gain, and much to lose, from the *per se* rule of union incapacity adopted below.

ARGUMENT

I. *GARDNER-DENVER* DOES NOT APPLY IN CASES WHERE ARBITRATORS HAVE BEEN GIVEN EXPLICIT AUTHORITY TO DECIDE CLAIMS ARISING UNDER FEDERAL AND STATE STATUTES AND REGULATIONS IN ACCORDANCE WITH THOSE LAWS.

The Second Circuit purportedly derived from *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), its rule that union-negotiated waivers of represented employees' right to a judicial forum for their statutory claims are never enforceable. Some of the language in *Gardner-Denver,* if viewed in isolation, can be invoked as support of this ostensible rule. However, as the Court's reliance on *Wilko v. Swan*, 346 U.S. 427 (1953), makes clear, *see Gardner-Denver*, 415 U.S. at 52, 58, the 1974 decision reflected an earlier period of judicial skepticism regarding the competence of private arbitrators to decide statutory claims. *Wilko* was subsequently overruled in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), and the Court has significantly altered its view of arbitral competence, ruling that a wide range of statutory claims fall within the presumption of arbitrability established by the FAA. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-26 (1991) (recounting this history).

More to the point, the Court has rejected the critical underpinning of *Gardner-Denver*: that "an employee's rights under Title VII [and, by extension, other federal employment statutes] are not susceptible of prospective waiver." *Gardner-Denver*, 415 U.S. at 51-52. For, indeed, both *Gilmer* (which involved the arbitrability of claims under the Age Discrimination in Employment Act), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (which involved the arbitrability of statutory employment discrimination claims under state law), could not be clearer on the distinction between the right to a judicial forum, which can be waived in favor of arbitration, and the substantive rights embodied in these laws, which cannot be waived by predispute agreements: "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28 (internal quotation marks omitted; brackets in original). *Circuit City* also read the FAA to cover the employment disputes of almost all U.S. workers, excluding only transportation workers.

This change in the governing legal landscape, in the view of *amicus*, requires a reassessment of the actual holding in *Gardner-Denver*. The decision in that case was predicated on the limited scope of authority of labor arbitrators when they are empowered to hear only contractual disputes and have not been authorized to resolve the statutory claims of represented employees. As the Court later observed in *Gilmer*, *Gardner-Denver* and its progeny "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." 500 U.S. at 35. In the instant case, not only does the labor agreement provide expressly for the arbitration of claims arising under the specified federal and state employment statutes but also the arbitrator, a trained lawyer, has been given explicit authority—and shoulders an obligation—to "apply appropriate law in rendering decisions based upon claims of discrimination." 498 F.3d at 90 (quoting collective bargaining agreement in the instant case).

The argument rejected in *Gardner-Denver* contained an element of overreaching – an attempt to use a purely contractual process to foreclose consideration of an employee's statutory claim. Harrell Alexander, Sr., with his union's assistance, presented his discharge grievance to the arbitrator, but the arbitrator had not been given authority to consider his racial discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The Court pointedly noted that labor arbitrators, unless they have been given such authority, sit merely as creatures of the collective bargaining agreement:

> *As the proctor of the bargain*, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. *The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties . . . . If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be*

> *enforced.* Thus, the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

415 U.S. at 53-54 (emphasis added) (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)) (internal citations omitted).

The critical importance of granting the arbitrator explicit authority to resolve statutory claims explains in large part this Court's insistence in *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998), on a "clear and unmistakable" union-negotiated waiver of the right to a judicial forum. In *Gardner-Denver* and the two decisions often cited as its progeny,[3] the arbitrator could act only as a conventional labor arbitrator; the arbitrator had authority only to resolve contractual issues under the collective bargaining agreement. But where, as here, the arbitrator is empowered to decide the case in accordance with the "appropriate law" and is legally trained,[4] he does not sit merely as a "proctor of the bargain," but is also affirmatively charged with enforcing substantive rights under external law.

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[3] *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981) ("Although an arbitrator may be competent to resolve many preliminary factual questions . . ., he may lack the competence to decide the ultimate legal issue whether an employee's right to a minimum wage or to overtime pay under the statute [Fair Labor Standards Act] has been violated."); *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) ("[B]ecause an arbitrator's authority derives solely from the contract, . . . an arbitrator may not have the authority to enforce § 1983.").

[4] This was another concern of *Gardner-Denver* and its progeny. *See Gardner-Denver*, 415 U.S. at 57 n.18; *Barrentine*, 450 U.S. at 743 & n.2; *McDonald*, 466 U.S. at 290 & n.9.

It is, of course, true that in some cases where unions represent grievants in arbitration proceedings, there may arise a "tension between collective representation and individual statutory rights[.]" *Gilmer*, 500 U.S. at 35. More generally, in some cases there may also be a tension between collective representation and the rights of particular individuals. But this Court long ago recognized the union's duty of fair representation owed to all represented employees as a critical mechanism for mediating such tensions or disagreements. *See Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *see also Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991). That duty would, of course, apply to the union's representation of employees in arbitration.[5]

It is, however, inconsistent with the FAA-based presumption of arbitrability, the presumption of regularity that labor unions enjoy as the exclusive statutory bargaining agent for represented employees, or a union's legal duty to fairly represent employees in the bargaining unit to erect a legal presumption that there is an inherent and inevitable conflict of such magnitude between the labor union and represented employees when dealing with statutory claims that arbitral promises must be categorically disregarded. In many cases, there is no plausible basis for assuming the actual or even likely presence of a conflict because the employee's statutory claim merely adds another helpful, supplementary legal theory to what is, in essence, a challenge to the factual basis for a disciplinary action. In other cases, the claim of older workers to be free of age discrimination dovetails with the union's longstanding, deeply felt interest in protecting the seniority of long-service employees.[6] Individuals complaining of discrimination in favor of younger workers are likely also to be protected by the union-negotiated seniority system. In yet other cases, the union may step aside to relinquish control of the arbitration process in favor of members who are able to attract private counsel. In those relatively few instances where, after an award has issued and a represented employee presents a factual basis for challenging the fairness of the arbitration in the particular circumstances, courts are well-positioned, as they now are when reviewing any award or even allowing an award into evidence, to determine whether the process was fair and whether the award was rendered by an "independent, neutral, and unbiased adjudicator that had the power to prevent the termination" or provide other sought-for relief. *Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002).

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[5] That obligation is reinforced by the affirmative duty under Title VII and other statutes imposed on the collective bargaining representative to not discriminate on racial and other prohibited grounds in performing its contract negotiation and administration functions. *See, e.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

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[6] *See generally* Bruce E. Kaufman & Jorge Martinez-Vasquez, *Monopoly, Efficient Contract, and Median Voter Models of Union Wage Determination: A Critical Comparison*, 11 J. LAB. RES. 401 (1990) (importance of seniority principle to union decision-making). It may not infrequently be the case that the union will be on firmer ground asserting a claim based on the seniority provisions of the collective bargaining agreement rather than stretching to premise a claim on federal age discrimination law. *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

In all events, the Court has not allowed mere speculative concerns about fairness or conflicts to derail arbitration agreements. The plaintiff in *Gilmer*, for example, argued that arbitration panels in the securities industry were likely to be biased, that pre-hearing discovery was likely to be deficient, that arbitrators do not often issue written opinions, that appellate review of awards was likely to be ineffective, and that individuals lack sufficient bargaining power to negotiate appropriate arbitration agreements with their employers. The Court's response was to correctly reject these "generalized attacks on arbitration," *Gilmer*, 500 U.S. at 30, in favor of awaiting "resolution [of claims of unfairness] in specific cases." *Id.* at 33. We believe the same approach is warranted here concerning any "generalized attacks" on the ability of unions to be faithful agents for bargaining unit employees in the arbitration process. *See also Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). But even if, for the sake of argument, the Court believes there is warrant for a deeper concern, the better approach would be not to bar enforcement of union-negotiated waivers of the right to a judicial forum as a *per se* rule but, rather, to send the case to arbitration while retaining the courts' ability to review any award for conformity with applicable law. Admittedly, a deferral or exhaustion approach was rejected in *Gardner-Denver* and its progeny but that was in a context where the arbitrator sat simply as "the proctor of the bargain," not a case, as here, where individual statutory employment claims are expressly arbitrable and the arbitrator has been given explicit authority to apply statutory law in deciding those claims. Where arbitrators have such authority, deferral to arbitration or exhaustion of contractual remedies[7] is not likely to be an exercise in futility, and a stay of litigation pending arbitration is affirmatively authorized by the FAA § 3.[8]

II. STRONG POLICY CONSIDERATIONS SUPPORT THE ENFORCEABILITY OF UNION-NEGOTIATED AGREEMENTS TO ARBITRATE THE INDIVIDUAL STATUTORY CLAIMS OF REPRESENTED EMPLOYEES.

We also believe that strong policy reasons support a rule allowing collective bargaining representatives to negotiate enforceable agreements requiring represented employees to resolve their employment disputes in arbitration rather than court.

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[7] Unions that are exclusive bargaining agents of employees in the bargaining unit have the authority under § 9 of the NLRA, 29 U.S.C. § 159, to negotiate a binding grievance and arbitration procedure that employees must invoke to challenge the employer's actions on wages, hours, and working conditions. This authority extends to all disputes covered by the collective bargaining agreement, whether the employee's theory of recovery is contractual or based on an employment statute.

[8] Section 3 provides: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant is not in default in such proceeding with such arbitration." 9 U.S.C. § 3.

The first consideration from the standpoint of the affected employees is that the theoretical ideal should not be the enemy of the achievable good. For most non-managerial, non-supervisory employees — that is, employees potentially eligible for union representation under the National Labor Relations Act[9]—a private lawsuit with representation by competent private counsel is largely an illusory opportunity.[10] For the vast majority of claims likely to be asserted by the members of the labor union in this case, who work principally in janitorial positions for commercial office buildings, arbitration is likely to be a mode of redress far superior to its likely alternative—a *pro se* civil action in the federal or state courts. The empirical evidence to date also indicates that most employees often fare as well, if not better, in arbitration relative to their realistic prospects in litigation.[11] And, in many cases, the employees will have the benefit of experienced union representation during the grievance procedure and the assistance of able union counsel in the arbitration.

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[9] *See* 29 U.S.C. § 152(11) (supervisor exclusion); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974) (managerial employee exclusion).

[10] The existing data are fragmentary but revealing. In 1991, researchers found that plaintiff lawyers are not likely to take an employment discrimination case, regardless of merit, unless the employee earned more than $400 a week. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation,* 43 STAN. L. REV. 983, 1008 (1991). Howard's 1995 a survey of 321 plaintiff lawyers, all members of the National Employment Lawyers Association—the plaintiff employment bar association—found that these lawyers required a retainer of at least $3,000-$3,600. William M. Howard, *Arbitration Claims of Employment Discrimination: What Really Does Happen? What Should Really Happen?* DISP. RESOL. J. Oct.-Dec. 1995, at 40. Lewis Maltby reports a 1995 study of plaintiff lawyers finding that these lawyers would not take a case unless the employee had at least $60,000 in back pay damages. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights,* 30 COLUM. HUM. RTS. L. REV. 29 (1998). *See also* Samuel Estreicher, *Beyond Cadillacs and Rickshaws: Towards A Culture of Citizen Service,* 1 N.Y.U. J. LAW & BUS. 323 (2005).

Internal processes culminating in final, binding arbitration are also distinctly preferable for many employment disputes because the relative speed and informality of grievance and arbitration permit a resolution to be obtained before the employment relationship has been severed—and often at early stages of the grievance procedure not even requiring an arbitration to be convened—and hence the employee retains a good prospect of continuing his career with the company despite his grievance.

The second consideration is one of efficiency both from the standpoint of employers and the courts. From the employer's perspective, it is difficult to manage an internal dispute system where some employees, because they are represented by labor unions, essentially are able to bypass internal processes with arbitration before a neutral as a final step, while other employees, because they are not so represented, are subject to predispute arbitration agreements. This both complicates the work of internal employee relations personnel and undermines the company and employee-wide interest in the uniform application of internal policies and procedures.

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[11] *See* note 2 *supra*.

There is also an efficiency loss from the perspective of the courts because many of the cases that will end up in court, often in the form of *pro se* filings, could have been readily resolved either in the internal, pre-arbitration grievance process, or in arbitration. Internal resolutions are cases that never show up in agency or court dockets. Most cases involve fact-specific issues of who did what, to whom, when, where, and why. Such cases are common fare for the grievance / arbitration process where they are likely to receive a fair hearing, especially because the union in pressing a grievance—typically through multiple steps prior to arbitration—or the arbitrator may be particularly sensitive to the needs of the workplace. The vast majority of these claims are not suitable for the litigation process where they may, for sheer lack of representation if no other reason, receive short shrift.[12]

Finally, another important policy consideration is from the labor relations standpoint. Many of the Chamber's members have some segment of their workforce represented by labor unions for collective bargaining purposes. The essence of collective bargaining is mutual commitment to the process and to the outcomes of that process. It is corrosive of a good working relationship between employer and union if express agreements to submit all disputes to the grievance and arbitration process can be circumvented where some employees either find counsel or sue on their own to pursue their statutory theories of recovery.

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[12] Also, to the extent binding union-represented employees to an arbitration bargain struck in good faith by their union and their employer proves problematic, it can simply be renegotiated or even eliminated in the next round of collective bargaining. Neither the employer nor the union would be likely to want to continue a regime that was not working to the satisfaction of affected employees.

CONCLUSION

For the reasons stated above, *Amicus Curiae,* Chamber of Commerce of the United States of America, respectfully requests that the Court reverse the Second Circuit's decision affirming the District Court's denial of Petitioners' motion to compel arbitration.

Respectfully submitted,

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IN THE

Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICES INDUSTRIES, INC.,
Petitioners,
v.
STEVEN PYETT, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioners before this Court in favor of reversal.[1]

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and other federal employment-related laws and regulations. Many of them have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts have been arrived at through collective-bargaining with employee representatives, while others are products of direct dealings with unrepresented employees. Many such contracts contain provisions requiring arbitration of employment-related claims and disputes. EEAC's members thus have an ongoing interest in preserving the enforceability of agreements, whether negotiated through collective bargaining or on an individual basis, calling for arbitration of employment-related disputes.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs in several cases before this Court supporting the enforceability of arbitration agreements, including *Gilmer v. Interstate/Johnson Lane*

Corp., 500 U.S. 20 (1991), *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998), *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), and *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). EEAC thus is familiar with the legal and public policy issues presented in this case, and is uniquely situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner 14 Penn Plaza LLC owns a commercial office building in New York. Pet. App. 2a. It contracts with Petitioner Temco Services Industries (Temco) for building cleaning and other services. *Id.* Respondents Steven Pyett, Thomas O'Connell, and Michael Phillips are (or were) employed by Temco at the 14 Penn Plaza building as night watchmen/porters, and were members of Local 32BJ of the Service Employees International Union (SEIU). Pet App. 3a. They were covered by a collective-bargaining agreement between SEIU and the Realty Advisory Board on Labor Relations, which is a "multi-employer bargaining association of the New York City real estate industry." *Id.*

The collective-bargaining agreement contains a provision prohibiting discrimination based on any characteristic protected by federal, state or local law and providing that all discrimination claims "shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." *Id.* In August 2003, 14 Penn Plaza hired Spartan Security to provide security personnel for the building and, as a result, Respondents were reassigned to different locations and positions. *Id.* They filed union grievances claiming age discrimination, wrongful transfer, and denial of overtime in violation of the collective-bargaining agreement. The grievances were submitted to arbitration, but before hearing, the union decided not to pursue the age discrimination and wrongful transfer claims. An arbitrator eventually ruled against Respondents. *Id.*

While the arbitration was pending, Respondents filed administrative charges with the EEOC. After receiving a notice of dismissal and right-to-sue, they filed an action claiming they were transferred and replaced by younger workers in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*. *Id*.

Petitioners moved to dismiss or, in the alternative, to compel arbitration, which the district court denied. Pet. App. 13a. Relying on the Second Circuit's decision in *Rogers v. New York University*, 220 F.3d 73 (2d Cir. 2000), it held that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." Pet. App. 21a.

On appeal, the Second Circuit affirmed the district court's ruling and in so doing, reaffirmed its holding in *Rogers*. Pet. App. 1a. There, it concluded that this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)—which held that arbitration of a union grievance pursuant to a collective-bargaining agreement would not bar an employee from subsequently pursuing statutory discrimination claims raised during that process in court—categorically foreclosed enforcement of collectively-bargaining arbitration provisions, regardless of the clarity of those provisions, even though that issue was not in fact decided in *Gardner-Denver* and the Court's subsequent decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), held that individual ADEA statutory claims could be subject to binding arbitration. Pet. App. 8a.

SUMMARY OF ARGUMENT

It is now well-settled that when an *individual* agrees, as a condition of employment, to submit all employment-related disputes to arbitration, that agreement stands "upon the same footing as other contracts" and is enforceable with respect to statutory employment discrimination claims as well as other disputes. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The central question in this case is whether the same holds true when a *union* makes such an agreement on behalf of the employees it represents. Evincing a profound disregard for the strong federal policy reaffirmed repeatedly by this Court and by Congress favoring arbitration, the court below improperly held that an arbitration clause contained in a collective-bargaining agreement is *categorically* unenforceable, regardless of the circumstances.

In agreeing to binding arbitration of statutory employment claims, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (quoted in *Gilmer*, 500 U.S. at 26). This is true whether the agreement to arbitrate was negotiated on an individual basis or collectively on behalf of a group of employees. The decision below thus creates an inconsistency in the law by placing collectively-bargained arbitration clauses on unequal footing with those entered into between unrepresented employees and their employers, and thus deprives an entire class of workers the right to "'trade[] the procedures and opportunities for review of the courtroom for the simplicity, informality, and expedition of arbitration'" with respect to statutory discrimination claims. *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi*, 473 U.S. at 628).

Equally disturbing, the rationale articulated by the court below for imposing a categorical bar on binding arbitration of statutory claims in the collective-bargaining context rests on antiquated anti-arbitration sentiment that repeatedly has been rejected by this Court and runs counter to the strong federal policy favoring agreements to arbitrate. As the Court observed in *Gilmer*, the purpose of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." 500 U.S. at 24 (citations omitted). It reiterated this principle in *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 123 (2001), soundly rejecting "the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Id.* Indeed, "[t]he Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law . . . ." *Id.*

The speed with which disputes typically are resolved through arbitration far outpaces the judicial system. In arbitration, an award usually is issued within a year of the initial demand. *See* Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-*

Dispute Agreements to Arbitrate Employment Discrimination Claims, 5 Cardozo J. Conflict Resol. 1 (2003). In the employment context, this prompt resolution benefits both sides, but particularly employees, who typically can less afford a lengthy battle. In addition, employees are more likely to get their "day in court" in arbitration than they are in the judicial system; "no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997). As this Court noted in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001), there are "real benefits to the enforcement of arbitration provisions." In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id.* at 123.

ARGUMENT

I. THE DECISION BELOW UNDERMINES THE LONGSTANDING FEDERAL POLICY FAVORING ARBITRATION OF EMPLOYMENT DISPUTES

A. By Improperly Refusing To Enforce An Agreement To Arbitrate Employment Disputes Simply Because It Is Contained In A Collective-Bargaining Agreement, The Court Below Displayed A Profound Misunderstanding Of This Court's Prior Decisions Governing Employment Arbitration

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, provides that an arbitration agreement "shall be valid, irrevocable, and enforceable save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has observed:

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

This Court repeatedly has affirmed the strong federal policy favoring arbitration, noting that the purpose of the FAA "was to reverse longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1994) (citations omitted); *see also Hall St. Assocs., LLC v. Mattel, Inc.*, ___ U.S. ___, 128 S. Ct. 1396 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Randolph*, 532 U.S. 105 (2000). Thus, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. 20, 26 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

Section 4 of the FAA provides, in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Upon determining that the agreement to arbitrate is valid and addresses the disputed claim, the FAA requires, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.*

In *Gilmer*, this Court held that an arbitration agreement that an individual signed, as a condition of employment, in which he pledged to submit to arbitration any dispute that might arise out of his employment or the termination thereof, was enforceable under the FAA, so as to require him to arbitrate his claim that his employer engaged in age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* In so doing, the Court made clear that as a general rule, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26 (citation and internal quotation omitted).[2]

Thus, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citation omitted). The Court reiterated this principle in *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001), noting, "[t]he Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law . . . ." *Id.* at 123.

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[2] Shortly after *Gilmer*, Congress too endorsed the use of arbitration to resolve statutory employment discrimination claims. Section 118 of the Civil Rights Act of 1991 urges employers and employees alike to use out-of-court methods, including arbitration, to resolve disputes arising under each of these statutes:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. 102-166, § 118, codified as 42 U.S.C. § 1981 note (Alternative Means of Dispute Resolution) (emphasis added).

Even prior to *Gilmer*, this Court recognized arbitration as the preferred method of resolving workplace grievances. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *see also United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *and United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) ("Steelworker's Trilogy"). Granting a labor union's petition to compel arbitration, the Court in *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960) concluded, for instance, that only by giving "full play" to the means chosen for settlement—arbitration—would the congressional policy in Section 203(d) of the Labor Management Relations Act ("LMRA" or "Taft-Hartley Act") be effectuated. *Id.* at 566. Likewise, in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the Court observed that the "present federal policy is to promote industrial stabilization through the collective bargaining agreement." *Id.* at 578 (footnote omitted). It went on to remark that a "major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement," *id.*, noting that mandatory arbitration clauses were enforceable pursuant to Section 301 of the LMRA. *Id.*

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that a collectively-bargained mandatory arbitration provision that did not expressly reach statutory discrimination claims could not waive a covered worker's rights to a judicial forum for causes of action created by Congress—in that case, a statutory cause of action for race discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* The court below surmised, incorrectly, that *Gardner-Denver* categorically precludes enforcement of a collectively-bargained agreement containing a clause requiring submission of statutory discrimination claims to arbitration. *Gardner-Denver* simply does not reach that issue, and merely holds that when an arbitrator has rendered a decision based on wholly contractual claims, that decision does not bar a subsequent lawsuit to enforce statutory rights under Title VII. There, the Court observed that contractual rights and statutory rights "have legally independent origins and are equally available to the aggrieved employee," 415 U.S. at 52, but stressed that the arbitrator in that case was "confined to the interpretation of the collective bargaining agreement." *Id.* at 53. Thus, *Gardner-Denver* turned on a distinction between contractual claims, which were covered by the applicable arbitration agreement, and statutory claims, which were not. *Id.* Importantly, it did not address the situation presented in this case in which the arbitration clause at issue plainly covers statutory as well as contractual discrimination claims.

The court below also misconstrued *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), in which this Court refused to bar an employee from pursuing his statutory discrimination claim in court where the arbitration clause contained in a collective-bargaining agreement did not contain a "clear and unmistakable" waiver. *Id.* at 82. Significantly, however, the Court in that case did not rule that such clauses were categorically unenforceable, deciding that it would "not reach the question." *Id.* Despite this, the court below nevertheless affirmed the district court's holding that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." Pet. App. 21a.

B. The Decision Below Is Premised On A Long Outdated And Discredited Notion That Arbitration Is An Inferior Means Of Resolving Disputes

The rationale articulated by the court below for imposing a categorical bar on binding arbitration of statutory claims in the collective-bargaining context rests on antiquated anti-arbitration sentiment that repeatedly has been rejected by this Court and runs counter to the strong federal policy favoring agreements to arbitrate. In *Mitsubishi,* this Court observed, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." 473 U.S. at 626-27.

This outmoded "suspicion of arbitration" is particularly misplaced in the employment context. Arbitration of employment disputes offers significant advantages to both employers and employees. As this Court noted in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001), there are "real benefits to the enforcement of arbitration provisions." In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id.* The real cost advantages associated with arbitration may well be even more meaningful in the collective-bargaining context, where those covered by union contracts often are hourly employees who could be most financially impacted by having to pursue statutory claims in federal court. "Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997).

In addition, the relative speed with which arbitrations are conducted compared to litigation also benefits both parties to an employment dispute, but particularly the employee, who typically can less afford a lengthy battle. As one commentator observed:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that

> good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for* Enforcing *Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims,* 5 Cardozo J. Conflict Resol. 1 (2003).

II. UNION-REPRESENTED EMPLOYEES ARE ENTITLED TO THE SAME BENEFITS OF ARBITRATION AS ARE ENJOYED BY THEIR NONUNION COUNTERPARTS

The decision below creates an anomaly in employment law by rendering it virtually impossible for union-represented employees and their employers to exercise the same basic right that unrepresented employees and their employers have enjoyed since *Gilmer*, that is, the right to "'trade[] the procedures and opportunities for review of the courtroom for the simplicity, informality, and expedition of arbitration'" with respect to statutory discrimination claims. *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628). The arbitration agreement at issue in this case generally is similar to the one in *Gilmer*, with one significant difference: while the plaintiff in *Gilmer* himself signed the document containing his agreement to arbitrate, Respondents were represented by a labor union, which negotiated and executed the arbitration clause in this case as part of a broader collective-bargaining agreement. That single distinction, however, does not logically justify denying an entire class of workers the benefit of resolving their workplace disputes through binding arbitration.

Under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*, a union duly selected by a majority of the employees in a unit appropriate for collective-bargaining is the exclusive representative of all the employees in such unit for the purposes of negotiating and entering into contracts with their employer governing their "rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). Thus, when employees choose a union as their agent, they authorize it to bind them collectively and individually to agreements covering the entire gamut of the "terms and conditions of employment."

It is well-established that a procedure for resolving employment disputes is a "term or condition of employment" and thus is a mandatory subject of collective-bargaining under the NLRA. *See United Elec., Radio & Mach. Workers v. NLRB*, 409 F.2d 150 (D.C. Cir. 1969); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943). Furthermore, this Court in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983), held that when employees select a union to represent them, they invest the union with the authority to waive not only statutory rights that are collective in nature, but also those, like discrimination claims, that are individual in nature.

Applying these principles, there can be no question that Respondents' union was authorized to negotiate a binding arbitration clause for the resolution of statutory discrimination claims on behalf of the collective-bargaining unit as a whole. To rule otherwise would destroy the mutuality of obligations on which collective-bargaining depends and would unjustifiably deprive union employees of benefits that flow to nonunion employees as a result of their free access to binding arbitration to resolve their workplace disputes.[3]

As Chief Justice Burger once observed:

> The reasons for favoring arbitration are as wise as they are obvious: litigation is costly and time consuming, and, more to the point in this case, judges are less adapted to the nuances of the disputes that typically arise in shops and factories than shop stewards, business agents, managerial supervisors, and the traditional ad hoc panels of factfinders. By bringing together persons actually involved in the workplace, often assisted by a neutral arbitrator experienced in such matters, disputes are resolved more swiftly and cheaply. This mechanism promotes industrial harmony and avoids strikes and conflicts; it provides a swift, fair and inexpensive remedy.

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (Burger, C.J., dissenting) (citation omitted).

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[3] A union's duty of fair representation under the NLRA provides a safeguard against any concern that an individual's rights might give way as a result of their subordination to collective interests. *See Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 705 (1983).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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BRIEF

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IN THE

Supreme Court of the United States

14 PENN PLAZA LLC AND
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
AND MICHAEL PHILLIPS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, THE ASIAN AMERICAN JUSTICE CENTER, LEGAL MOMENTUM, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AND THE NATIONAL WOMEN'S LAW CENTER, IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law, the American Association of People with Disabilities, the Asian American Justice Center, Legal Momentum, the Mexican American Legal Defense and Educational Fund, the National Partnership for Women & Families, and the National Women's Law Center submit this Brief as *amici curiae* with the consent of the parties[1] in support of Respondents and the proposition that a labor union cannot waive through collective bargaining its members' individual rights to file a statutory anti-discrimination claim in federal district court, absent explicit individualized consent.

All *amici* represent large segments of our society who rely on our nation's civil rights laws to ensure that they are not victims of workplace discrimination. An individual's ability to seek redress in federal district court for unlawful discrimination is critical to the eradication of discrimination in the workplace. To the extent that employees without a personal choice are prevented from bringing such claims in federal court, unlawful discrimination may go without remedy. The people served by the *amici* will be directly affected by the Court's ruling in this matter.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. A letter from the Petitioners' counsel consenting to the filing of this brief has been filed along with this brief. A letter from the Respondents' counsel consenting to the filing of amicus briefs is on file with the clerk.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the national effort to ensure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country. The Lawyers' Committee is interested in ensuring that the goal of civil rights legislation to eradicate discrimination is fully realized, and is concerned in this case with the potential negative impact on a plaintiff's ability to obtain relief for valid civil rights claims. To this end, the Lawyers' Committee has filed amicus briefs opposing limitations on access to relief for victims of discrimination in such cases as *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 76 (1998). The resolution of this case will have a significant effect on the extent to which the Lawyers' Committee can protect the rights of its clients.

The American Association of People with Disabilities ("AAPD") is a national membership organization working to increase the political and economic power of people with disabilities and their families. Founded on the fifth anniversary of the Americans with Disabilities Act ("ADA"), AAPD has a strong interest in full enforcement and implementation of the ADA and other civil rights laws.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. AAJC and its Affiliates have a long-standing interest in ensuring that federal anti-discrimination rights are protected because they have a significant impact on the Asian American community – of which over 600,000 are union members – and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum is particularly aware of the vital importance of protecting union members' statutory remedies for employment discrimination because we often represent women in the skilled trades whose unions have responded inadequately to, or have even contributed to, discrimination women face in the field. Legal Momentum has participated as *amicus curiae* in leading cases supporting women workers including *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), and has vigorously supported the right to judicial forums for federal employment discrimination claims as *amicus curiae* in cases such as *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) and *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998).

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national Latino nonprofit civil rights legal organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and community education programs, the civil rights of Latinos living in the United States. MALDEF has a strong interest in the outcome of these proceedings. MALDEF's mission includes a commitment to pursuing fair and equal employment opportunities for Latinos in the United States. MALDEF has represented Latino workers and legal interests in numerous federal employment discrimination cases.

The National Partnership for Women & Families ("National Partnership") is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous *amicus curiae* briefs in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement of anti-discrimination laws, which includes employees' right to seek redress in court for unlawful discrimination. NWLC has prepared or participated in numerous *amicus* briefs filed with the Supreme Court and the Courts of Appeals in employment discrimination cases.

SUMMARY OF ARGUMENT

Congress has sought to protect individuals from workplace bias by granting employees who are victims of invidious discrimination a right to recover against employers. Congress expects that meritorious discrimination claims will deter and ultimately eradicate employment bias from the workplace. Congress further prohibits labor unions from discriminating against employees and members, evincing its understanding that labor unions are at times responsible for or complicit in workplace discrimination. Unions and employers cannot be empowered with the exclusive ability to enforce the rights of covered employees under the Age Discrimination in Employment Act ("ADEA") and other anti-discrimination statutes. Accordingly, a mandatory grievance arbitration clause in a Collective Bargaining Agreement ("CBA") cannot waive an individual employee's right to a judicial forum to resolve a federal statutory discrimination claim.

The Court's decisions, *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), confronted and resolved under what circumstances federal statutory rights may be waived by a pre-dispute mandatory arbitration agreement contained in a CBA. In *Gardner-Denver*, the Court recognized the importance of individual control over discrimination claims, concluding that an employee's rights under a federal anti-discrimination statute cannot be waived by a CBA; instead, the employee must be permitted to pursue his or her separate remedies under CBA grievance-arbitration clauses and under federal anti-discrimination statutes. *Gardner-Denver*, 415 U.S. at 59-60. The Court in *Gilmer* reaffirmed the importance of individual control over statutory anti-discrimination claims, holding as the natural corollary of *Gardner-Denver* that an individual can agree to arbitrate his or her own anti-discrimination claims before the dispute arises. *Gilmer*, 500 U.S. at 34-35.

To permit a CBA to effect a waiver of an individual's right to bring a discrimination claim in federal district court would not simply move venue from a judicial forum to an arbitral one; rather it would extinguish the individual right and replace it with a collective one that could be abandoned without the individual's consent. A union has wide latitude and sometimes competing interests in exercising its representative functions, including deciding whether to pursue even a meritorious discrimination claim. A union exercises these representative functions on behalf of all members of the bargaining unit, including on behalf of bargaining unit employees who have chosen not to become union members. *See Commc'n Workers of Am. v. Beck*, 487 U.S. 735 (1988). Under the legal framework Petitioners urge, therefore, an individual employee may be left without any forum to resolve meritorious ADEA claims if the union representing his or her bargaining unit declines to arbitrate such claims. Such a result would diminish the prophylactic effect of the anti-discrimination laws, contrary to congressional intent.

The circuit courts, with just one exception, all apply *Gardner-Denver* to prevent CBAs from waiving individual rights to pursue discrimination claims in federal court. Furthermore, they have expressly followed the distinction between a union-negotiated and an individual-negotiated arbitration clause that both Congress and the *Gardner-Denver* Court recognized as critical. Since the relevant law and policies have not significantly changed in the intervening years, the principle of *stare decisis* weighs heavily against Petitioners' efforts to undermine or overturn *Gardner-Denver*.

ARGUMENT

I. DENYING AN INDIVIDUAL'S RIGHT TO A FEDERAL FORUM TO REMEDY WORKPLACE DISCRIMINATION BY VIRTUE OF A CBA IGNORES CONGRESSIONAL INTENT AND UNDERMINES IMPORTANT PUBLIC POLICY.

The Court has long recognized the paramount importance Congress has attached to each individual's right to be free from invidious discrimination.[2] This national dedication stems from a desire to "eliminate 'the last vestiges of an unfortunate and ignominious page in this country's history.'" *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 465 (1986) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

To overcome this history of workplace discrimination based on characteristics such as race, sex, and age, Congress enacted the ADEA, Title VII, and other statutes which allow individuals to proceed to court to protect their rights against employers.[3] *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq. ("FLSA"); Equal Pay Act of 1963, 29 U.S.C. § 206(d) ("EPA"); Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA"); Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq.; Civil Rights Act of 1991, 42 U.S.C. §§ 1981 et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ("Title VII"); Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"). By these statutory means, Congress has ensured that every person has the right to challenge unlawful workplace discrimination when faced with it.

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[2] *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 357 (1995) (noting that the ADEA "reflects a societal condemnation of invidious bias in employment decisions" in a case brought by an individual employee); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779 (1976) ("[A]meliorating the effects of past racial discrimination [is] a national policy objective of the 'highest priority.'").

While the main goal of workplace anti-discrimination laws was to provide redress against discriminating employers, Congress also protected employees from labor unions' discriminatory practices. Indeed, Petitioners' own brief ("Petr.'s Br.") cites numerous instances in which discrimination claims have succeeded against unions. *See* Petr.'s Br. at 42-43 n.20 (citing cases).[4] Although most labor unions fairly represent the interests of all of their members, some have been complicit in or even contributed to an employer's discriminatory practices. In such instances, if unions and employers were able to agree to supplant individual enforcement of anti-discrimination laws through the use of mandatory arbitration clauses in CBAs, the complicit union would then be in a position to foreclose any remedy the employee has against the employer.[5]

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[3] *See, e.g.*, *McKennon*, 513 U.S. at 358 (observing that Title VII and the ADEA share the common purpose of eliminating workplace discrimination through individual remedial claims).

[4] *See also Burger v. Int'l Union of Elevator Constructors Local No. 2*, 498 F.3d 750 (7th Cir. 2007) (awarding back pay to an elevator mechanic who brought suit against union for retaliation based on age discrimination claim filed with the EEOC); *Alexander v. Local 496, Int'l Union of N.A.*, 177 F.3d 394, 406 (6th Cir. 1999) (finding local and international labor unions violated Title VII and § 1981 after denying membership and employment opportunities to African-American applicants on the basis of their race); *EEOC v. Shopmen's Local 832*, 112 F.3d 503, reported in full at 1997 WL 216202 (2d Cir. 1997) (affirming sexual discrimination judgment against union that failed to pursue employee's request not to be assigned in close proximity with fellow union member who raped her).

Even when the union did not participate in the workplace discrimination, it may not have the same incentive as the victimized employee to pursue the claim through a grievance arbitration process and may have conflicting interests based upon its collective representation. The conflict of interest is apparent in cases such as this one where, according to Respondents, the Union would not bring their ADEA claims because "the Union had consented to Spartan Security being brought into the building"; therefore, the Union felt that it could not contest Respondents' replacement as night watchmen by Spartan Security personnel. *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 90-91 (2d Cir. 2007). Preventing employees from challenging discriminatory employment practices undermines Congress's goal of eradicating discrimination in the workplace.

Construing a grievance arbitration clause in a collective-bargaining agreement to waive individual rights to pursue discrimination claims in federal court could be used to deny the aggrieved employee any avenue to seek the remedies provided under law for illegal discrimination. To permit unions and employers to play such a gate-keeping role and to contract away employees' rights to bring discrimination lawsuits would defeat the structure and purpose of the anti-discrimination statutes enacted by Congress.

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[5] In such cases, the employee may have a claim against the union for a breach of the duty of fair representation; however, as discussed *infra* Section I.C., this does not mitigate the collective action concerns.

A. *Gardner-Denver* Precludes Waiver Of An Individual's Right To Pursue Enforcement Of Statutory Anti-Discrimination Rights In Federal Court Through A Collective Bargaining Agreement.

Gardner-Denver examined directly and answered correctly whether, in the collective bargaining process, a union can waive its members' right under Title VII to file a discrimination claim in federal court. In determining what rights a union may waive on behalf of its members, the Court appropriately distinguished collective rights, which the union may waive, from individual rights, which cannot be waived. *Gardner-Denver*, 415 U.S. at 51. Collective rights, such as the right to strike, are those that "foster the processes of bargaining and properly may be exercised or relinquished by the union as collective bargaining agent to obtain economic benefit for union members." *Id.* On the other hand, federal anti-discrimination laws do not concern "majoritarian processes, but an individual's right to equal employment opportunity." *Id.*[6] Based on this distinction, the Court held:

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[6] Petitioners dismiss this collective bargaining analysis as dicta. Petr.'s Br. at 38. In fact, it was an integral part of the analysis, as the Court rejected the argument that the employee

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form ***no part*** of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances [i.e., in a collective bargaining agreement], an employee's rights under Title VII are not susceptible of prospective waiver.

Gardner-Denver, 415 U.S. at 51-52 (emphasis added).[7]

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had waived his Title VII rights either through the CBA *or* through the submission of his claim to arbitration. *Gardner-Denver*, 415 U.S. at 51-52. The Court's subsequent rejection of the "mistrust of arbitration" as expressed in *Gardner-Denver*, *Gilmer*, 500 U.S. at 34 n.5, left intact the primary basis for the rule of *Gardner-Denver* prohibiting prospective waiver – concern over the protection of individual rights guaranteed under federal anti-discrimination statutes in the context of majority-ruled negotiations. *See Blakely v. US Airways, Inc.*, 23 F. Supp. 2d 560, 575 (W.D. Penn. 1998) ("Thus, most courts agree that the Court in *Gilmer* simply excised that aspect of *Alexander's* rationale which reflected untrustworthiness toward the arbitral process and that *Alexander* remains the law of the land."); *see also* William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 635 (2006) ("The *Gardner-Denver* analysis rides two horses and the second horse – skepticism about the way in which majoritarian process will affect minority workers in collective bargaining – runs separate and apart from that decision's view of the arbitration process and thus remains intact."). This is precisely why *Gilmer* correctly relied upon the collective-individual distinction, *Gilmer*, 500 U.S. at 35, and why the strong majority of lower court decisions since *Gardner-Denver* and *Gilmer* have turned on exactly this distinction. *See infra* notes 10 and 20.

[7] Contrary to Petitioners' argument, *Gilmer* did not "expressly reject[] that position," *see* Petr.'s Br. at 24, n.9, 38-39, because

Here Respondents exercised their individual rights under the ADEA by filing an age discrimination suit in federal district court. Although Petitioners argue that the union waived Respondents' right to sue in federal court, *Gardner-Denver* mandates that the individual rights under federal anti-discrimination laws, such as the ADEA, cannot be a part of the collective bargaining process. Accordingly, Respondents are entitled to bring their ADEA claims in federal court.

B. Allowing Federal Anti-Discrimination Claims To Be Subject To Mandatory Binding Arbitration Under A CBA Risks Improperly Subordinating Individual Interests And Claims

In *Gardner-Denver*, the Court cautioned that a union's interests for the bargaining unit as a whole may subjugate the individual's statutory rights to be free from discrimination, thereby corrupting the structure and purpose of the statutes Congress

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Gilmer did not concern a collective bargaining agreement, but an individual employment agreement. Accordingly, this Court in *Metropolitan Edison Co. v. NLRB* distinguished a union's waiver of individual rights under Title VII from collective waiver of rights under the National Labor Relations Act ("NLRA"), where the NLRA contemplated that individual rights to be free of discrimination based upon union membership under the Act "may be waived *by the union* so long as the union does not breach its duty of good-faith representation." 460 U.S. 693, 706, n.11 (1983). This important distinction, which would have been unimportant if *Gilmer* had endorsed waiver by CBA, undermines Petitioners' extensive reliance on *Metropolitan Edison*. *See, e.g.*, Petr.'s Br. at 23-24.

enacted to eliminate discriminatory practices in the workplace.[8] The Court noted that:

> [a] further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.

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[8] Judge Posner highlighted this conflict in his well-reasoned opinion in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362-63 (7th Cir. 1997):

> The essential conflict is between majority and minority rights. The collective bargaining agreement is the symbol and reality of a majoritarian conception of workers' rights. An agreement negotiated by the union elected by a majority of the workers in the bargaining unit binds all the members of the unit, whether they are part of the majority or for that matter even members of the union entitled to vote for union leaders – they need not be. The statutory rights at issue in these two cases are rights given to members of minority groups because of concern about the mistreatment (of which there is a long history in the labor movement, *see, e.g.*, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (1944)) of minorities by majorities. We may assume that the union will not engage in actionable discrimination against minority workers. But we may not assume that it will be highly sensitive to their special interests, which are the interests protected by Title VII and the other discrimination statutes, and will seek to vindicate those interests with maximum vigor.

See also Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and Proposed Reconciliation*, 77 B.U. L. Rev. 687, 689-92 (1997) (noting that issues of race and age discrimination "have traditionally divided unions from within" and that "[u]nion interests may diverge from those of a particular employee, especially in discrimination cases").

Gardner-Denver, 415 U.S. at 58, n.19 (citing *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944)).[9]

When the Court later held in *Gilmer* that an individual could agree to pre-dispute binding arbitration of an ADEA claim, the Court distinguished an individual's own agreement, which was at issue in *Gilmer*, from the collective bargaining at issue in *Gardner-Denver*. *See Gilmer*, 500 U.S. at 34 (citing *Gardner-Denver*, 415 U.S. at 58, n.19).

> [B]ecause the arbitration in [the *Gardner-Denver* line of cases] occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case.

Gilmer, 500 U.S. at 35.[10] In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 76 (1998), the

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[9] The Court reiterated this concern in decisions following *Gardner-Denver*. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981) ("[E]ven if the employee's [Fair Labor Standards Act] claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration."); *McDonald v. W. Branch*, 466 U.S. 284, 291 (1984) ("The union's interest and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee.") (citations omitted).

[10] In the aftermath of *Gilmer* and *Wright*, the circuit courts properly focused on whether the individual chose between a judicial or arbitral forum. *Rogers v. N.Y. Univ.*, 220 F.3d 73, 75

Court was reluctant to diminish the need for continued adherence to the bright-line prohibition against the waiver of individual statutory rights through majority-governed CBAs.[11]

This bright-line rule is critical in part because under a CBA in most cases, as here, the union has the exclusive right to prosecute an arbitration claim.[12]

(2d Cir. 2000) (*per curiam*) ("Following *Gilmer's* lead, most lower courts have focused on the party negotiating the waiver of rights. When the arbitration provision has been negotiated by a union in a CBA, these courts have held that *Gardner-Denver* applies."); *Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999), *judgment reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (en banc) ("Whatever the Supreme Court said – or more precisely, refrained from saying – in *Wright*, we do not understand the Court in *Gilmer* to have overruled *Gardner-Denver*."); *Jonites v. Exelon Corp.*, 522 F.3d 721, 725 (7th Cir. 2008) (Posner, J.) ("Most courts . . . have closed the question that the Supreme Court left open in [*Wright*] (the 'might' question) by holding, as we had done in *Pryner*, that while an individual worker can waive his right to a judicial remedy, a union cannot do so on his behalf.") (citing cases); *Air Line Pilots Ass'n*, 199 F.3d at 484-85 ("Absent congressional intent to the contrary, a union may not use the employees' individual statutory right to a judicial forum as a bargaining chip to be exchanged for some benefit to the group; the statutory right 'can form no part of the collective bargaining process.'").

[11] *See Wright*, 525 U.S. at 80-81 (distinguishing the holding in *Gilmer* from cases like *Gardner-Denver* prohibiting a union's waiver of the individual statutory rights of employees under collective-bargaining agreements).

[12] *See, e.g.*, *Pryner*, 109 F.3d at 362 (Posner, J.) ("Most important, the grievance and arbitration procedure can be invoked only by the union, and not by the worker. The worker has to persuade the union to prosecute his grievance and if it loses the early stages of the grievance proceedings to submit the grievance to arbitration.") (*citing Vaca v. Sipes*, 386 U.S. 171, 190-91 (1967)).

As a result, if the union decides not to file a grievance or prosecute it to conclusion, the practical effect is not simply a waiver of forum rights, but would allow the union to control and potentially waive the enforcement of individual statutory rights and remedies. This risk is not hypothetical. In this case, the union first asserted the age discrimination claims on behalf of Respondents, only to later withdraw the grievances, deciding that it could not pursue the employees' claims of discrimination because the union had consented to the employment action giving rise to the claim. JA at A396. If the CBA is read to preclude them from filing in federal court, under its terms Respondents have no right to assert their ADEA claims individually. JA at A168. In its decision below, the Second Circuit noted this risk:

> [This case] illustrates why the Supreme Court may be reluctant to treat arbitration provisions in CBAs the same as arbitration provisions in individual contracts. If, as plaintiffs allege, the Union refused to submit the wrongful transfer claims to arbitration because the Union had agreed to the new contract, the interests of the Union and the interests of plaintiffs are clearly in conflict.

Pyett v. Pa. Bldg. Co., 498 F.3d 88, 94 n.5 (2d Cir. 2007).[13]

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[13] Petitioners argue that the union's failure to arbitrate Respondents' age discrimination claims is irrelevant because Respondents still had the opportunity to "comply with the promise to arbitrate" by bringing their statutory claims to arbitration on their own. Petr.'s Br. at 39. However, the CBA does not provide for individual arbitration, and the employers' offer to individually arbitrate is clearly beyond the terms of that CBA. Brief for the Respondent at 41-50, 14 Penn Plaza LLC v.

Such a result is antithetical to the strictures of employment discrimination statutes and the "congressional command that each employee be free from discriminatory practices." *Gardner-Denver*, 415 U.S. at 51. Accordingly, the rights conferred by the ADEA and other anti-discrimination statutes "can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind [such laws]." *Gardner-Denver*, 415 U.S. at 51.

C. The Duty Of Fair Representation Does Not Mitigate The Collective Action Concerns At The Heart Of *Gardner-Denver.*

The duty of fair representation is designed to ensure that unions weigh differing collective concerns in a rational manner, and accordingly do not give any special consideration to individual rights to be free from discrimination. A claim for breach of this duty does not protect individuals who are discriminated against where their union rationally declines to press their claim in arbitration in light of other concerns. *See, e.g.*, *Robbins v. Prosser's Moving & Storage Co.*, 700 F.2d 433, 442 (8th Cir. 1983) (meritorious claim insufficient to demonstrate breach in light of union's other priorities).[14]

Pyett, No. 07-581 (July 14, 2008) ("Resp't Br."). *See also* Brief of the Service Employees Int'l Union, Local 32BJ, as *Amicus Curiae* in Support of Respondents at 17-20.

[14] The deferential legal standards of the duty of fair representation, and how those standards are accordingly insufficient to protect individual employees, are well detailed in the Brief for the National Academy of Arbitrators as Amicus Curiae Supporting Respondents at 16-23, 14 Penn Plaza LLC v. Pyett, No. 07-581 (June 2008).

The requirement that a union fairly represent its constituents therefore serves a decidedly different purpose from the individual ADEA and Title VII remedies. Congress created private ADEA and Title VII remedies specifically to "spur" employers to reevaluate employment practices and eliminate discrimination as far as possible. *McKennon*, 513 U.S. at 358 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).[15] A successful claim for breach of the duty of fair representation may affect the union's behavior; however, it does nothing to redress or prevent workplace discrimination that occurs at the hands of the employer. Moreover, the practical reality of requiring a plaintiff to initiate another round of litigation and prove both the underlying claim of discrimination and the elements of the union's breach of duty necessarily makes the enforcement of individual statutory rights more difficult.[16]

As the Court explained in *Gilmer*, arbitration of a discrimination claim can continue to serve the statute's remedial and deterrent purposes only if the *arbitral* forum allows an employee to effectively vindicate his or her statutory cause of action. *Gilmer*, 500 U.S. at 28. Enforcing the collective arbitral clauses at issue here, in contrast to the individual arbitration clause in *Gilmer*, would surrender to unions prospective litigants' ability to vindicate their claim and thereby contravene the congressionally designed remedial and deterrent purposes of the statutes.[17]

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[15] *See also Albemarle*, 422 U.S. at 417 (stating that "the primary objective of Title VII [is] a prophylactic one"); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (noting that Title VII's goal "was to achieve equality of employment opportunities and remove barriers that have operated in the past.").

[16] Even assuming *arguendo* that such a suit could provide "complete relief for statutory claims" against the employer, as the Petitioners suggest it might, Petr.'s Br. at 42 n.19, the victimized employee would have to pursue his or her claims through the formal grievance procedure, battle with the union, *and then* complete litigation against the union. Such a convoluted procedure hardly "minimizes duplicative efforts and resolves disputes quickly, less expensively, fairly, and effectively." Petr.'s Br. at 7.

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[17] For similar reasons, if an anti-discrimination clause of a CBA incorporates federal statutory rights (as in the CBA currently before this Court), it should be viewed as creating only "a contractual right that is *coextensive* with the federal statutory right," *Wright*, 525 U.S. at 79 (emphasis added), and the burden should be on the employer to prove otherwise, *see, e.g.*, *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 655 (6th Cir. 2000) (where employee submitted claim to arbitration under CBA that incorporated external law, "[t]he burden was on [the employer] to show that [the employee] waived his statutory rights, not merely that he arbitrated a discrimination claim under a collective agreement that also had a basis in federal law"). As demonstrated by Respondents and their local union, such a showing cannot be made here. Brief for the Respondent at 41-50, 14 Penn Plaza LLC v. Pyett, No. 07-581 (July 14, 2008); Brief for the Service Employees International Union, Local 32BJ, as Amicus Curiae Supporting Respondents at 17-20, 14 Penn Plaza LLC v. Pyett, No. 07-581 (July 14, 2008). The most that could be said is that the CBA here creates a contractual right to be free from discrimination that is coextensive with the statutory rights. *See, e.g.*, *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 631-32 (6th Cir. 1999) ("Simply put, including a provision in a collective bargaining agreement that prevents discrimination against employees under a federal statute 'is not the same as requiring union members to *arbitrate* such statutory claims.'") (emphasis in original) (citations omitted); *Moore v. United Parcel Serv.*, 474 F. Supp. 2d 882, 894 (E.D. Mich. 2007) ("[A] collective-bargaining agreement that merely tracks the language of a federal statute, or references a federal statute, is not the same as explicitly waiving an individual's federal statutory right.").

II. THE PRINCIPLE OF *STARE DECISIS* SUPPORTS REAFFIRMING *GARDNER-DENVER*'S PROHIBITION OF PROSPECTIVE WAIVER OF INDIVIDUAL RIGHTS THROUGH COLLECTIVE BARGAINING AGREEMENTS.

For over three decades, *Gardner-Denver* has provided a reasonable bright line rule insuring that union members do not lose their individual right to be free from discrimination through the collective bargaining process. In light of the near uniformity in the case law,[18] considerations of *stare decisis* favor reaffirming *Gardner-Denver* and upholding the principle that a union cannot waive individual employees' statutory anti-discrimination rights in a CBA.[19] *Stare decisis* requires a party to provide a "special justification" for departing from established precedent and thereby promotes the evenhanded and consistent development of the law. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Considerations of *stare decisis* have special force in cases of statutory interpretation because "Congress remains free to alter what [the Court] ha[s] done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

The Court has traditionally been guided "by a series of prudential and pragmatic considerations" when reexamining prior holdings. *Planned Parent-*

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[18] *See infra* p. 21-22 and notes 20-21.

[19] Just recently this Court reiterated that "considerations of *stare decisis* . . . impose a considerable burden upon those who would seek a different interpretation that would necessarily unsettle many Court precedents." *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1953 (2008).

hood v. Casey, 505 U.S. 833, 854 (1992). These considerations include whether the precedent has proven "unworkable," *Payne*, 501 U.S. at 827; whether there has been a change in the factual or legal bases for the original decision, *Patterson*, 491 U.S. at 173; and whether the decision itself "unsettled" the law, *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2685-86 (2007); *Cont'l T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 47-49 (1977). These considerations counsel against overruling *Gardner-Denver*.

A. *Gardner-Denver* Established a Simple, Workable Rule.

Far from having been proven "unworkable," the law under *Gardner-Denver* has been consistent and near-uniform. A precedent is "unworkable" if it is "a positive detriment to coherence and consistency in the law . . . because of [the] inherent confusion [it] create[s]." *Patterson*, 491 U.S. at 173. But *Gardner-Denver* has provided coherent guidance, as all but one of the courts of appeals have consistently applied it to prohibit the waiver of individual rights under federal anti-discrimination statutes through a CBA.[20] The circuit courts have had little difficulty understanding that *Wright* simply preserved the status quo and the law on which employers and employees have relied since *Gardner-Denver*.[21] A precedent is not "unworkable" where, as here, "there is simply no evidence that [it] has caused or will cause uncertainty." *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996).

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[20] *See, e.g.*, *Jonites v. Exelon Corp.*, 522 F.3d 721, 725 (7th Cir. 2008); *Rogers*, 220 F.3d at 75; *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 630 (6th Cir. 1999); *Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999), *judgment reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (en banc); *Albertson's Inc. v. United Food & Com. Workers Union*, 157 F.3d 758, 761-62 (9th Cir. 1998); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453 (10th Cir. 1997); *vacated on other grounds*, 524 U.S. 947 (1998); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526-27 (11th Cir. 1997); *Varner v. Nat'l Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996).

B. The Factual And Legal Predicates Of *Gardner-Denver* Remain Unchanged.

There has been no evolution of legal principle to erode the basis of *Gardner-Denver*, nor have any of the facts upon which it was decided changed. As this Court explained in *Patterson*, a change in background legal principles, "through either the growth of judicial doctrine or further action taken by Congress," can justify departure from an established precedent in certain circumstances. *Patterson*, 491 U.S. at 173. Here, neither a change in this Court's jurisprudence nor any act of Congress creates a basis for departing from *Gardner-Denver*.[22] While judicial wariness of arbitration has waned since *Gardner-Denver*, the need to safeguard individual rights from collective decisions made by the union, a principal concern in *Gardner-Denver*, remains vital today.

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[21] Against this weight of consistent authority, the Fourth Circuit stands alone. *See, e.g., E. Associated Coal Corp. v. Massey*, 373 F.3d 530, 533 (4th Cir. 2004).

[22] Petitioners assert that the Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991), is a Congressional endorsement of arbitration in cases like this. It should be noted, however, that while the 1991 amendments encouraged methods of alternative dispute resolution "where appropriate," it also created the right to a jury trial in Title VII cases. As Judge Posner aptly observed, not only is majority-controlled arbitration not "appropriate" in discrimination cases, but "[i]t would be at least a mild paradox for Congress, having in another amendment that it made to Title VII in 1991 conferred a right to trial by jury for the first time, Pub. L. No. 102-166, § 102, § 1997A(c), 105 Stat. 1071, 1073 (1991), to have empowered unions, in those same amendments, to prevent workers from obtaining jury trials in these cases." *Pryner*, 109 F.3d at 363.

Furthermore, the factual context of *Gardner-Denver* persists – "the policy against discrimination [is] of the 'highest priority'" and "harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of . . . discrimination is made." *Gardner-Denver*, 415 U.S. at 47, 58 n.19. Workplace discrimination remains and unions may not always pursue individuals' claims of discrimination. *See supra* Part I. Because this potential conflict of interest that concerned the Court in *Gardner-Denver* still exists, the principle of *stare decisis* weighs heavily in support of this Court reaffirming its absolute prohibition of union waiver of individual employees' federal forum rights.

C. *Gardner-Denver* Did Not Upset Settled Law, While Overturning *Gardner-Denver* Would Cause Severe Disruptions.

In evaluating *stare decisis*, the Court also considers whether the precedent at issue upset settled law when it was adopted.[23] Here, there is no argument that *Gardner-Denver* was inconsistent with settled expectations. By contrast, overturning *Gardner-Denver* and its prohibition on union-negotiated waivers of individual statutory rights against discrimination would severely disrupt the current state of the law. *See CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951,

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[23] *See, e.g.*, *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2685-86 (2007) (partially overturning *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), four years later, because it "unsettled a body of law").

1961 (2008) ("Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.") (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. __, 128 S. Ct. 750, 756-57 (2008)).

Moreover, *Gardner-Denver* and the circuit court cases applying its absolute prohibition have not disrupted labor negotiations. As Judge Posner stated, "we are given no reason to believe that the ability of unionized workers to enforce their statutory rights outside of the grievance machinery established by collective bargaining agreements is undermining labor relations." *Pryner*, 109 F.3d at 363. To the contrary, *Gardner-Denver's* rule that unions cannot waive employees' individual statutory rights through collective bargaining agreements simply ensures that, in the course of labor negotiations, unions do not sacrifice the essential rights of individual employees to be free from discrimination for the sake of reaching a deal.

Indeed, *Gardner-Denver* has been the law for over three decades and has been applied in a remarkably uniform manner. The strong majority of circuit courts continue to affirm that it stands for the simple proposition that unions cannot collectively preclude an individual's right to a judicial forum for statutory discrimination claims. As it remains just as contrary to congressional design to permit unions to do so today as it was the day that *Gardner-Denver* was decided, this Court has no reason to overturn its correct decision.

CONCLUSION

For the foregoing reasons, the Second Circuit's judgment upholding the denial of Petitioners' motion to compel arbitration should be affirmed.

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IN THE
Supreme Court of the United States

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14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF RESPONDENTS

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INTEREST AND CONCERN OF THE *AMICUS*[1]

The National Academy of Arbitrators was founded in 1947 "to foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of industrial disputes on a professional basis," to adopt and secure adherence to canons of professional ethics, and to promote the study and understanding of the arbitration of industrial disputes. GLADYS GRUENBERG, JOYCE NAJITA & DENNIS NOLAN, THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK 26 (1997). As the historians of the Academy observe, the Academy has been "a primary force in shaping American labor arbitration." *Id.*

The Academy's stringent rules assure that only the most active, ethical, and well-respected practitioners are elected to membership along with scholars specially selected for significant contributions to the understanding of labor law and labor relations. Members are prohibited from serving as advocates or consultants in labor relations, from being associated with firms that perform those functions, and from serving as expert witnesses on behalf of labor or management. Currently, the Academy has approximately 650 U.S. and Canadian members.

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[1] Rule 37.6 statement: Counsel of record is the sole author of this brief. No person or entity other than the **National Academy of Arbitrators** has made any monetary contribution to the preparation or submission of this brief. Letters reflecting the consent of the parties to the filing of this brief have been filed with the Clerk.

The traditional function of labor arbitration was to resolve disputes between management and labor primarily involving questions of interpretation and application of the terms of collective bargaining agreements—grievance arbitration. Arbitration of disputes as to the application and interpretation of statutes protecting individual employees against specified forms of employment discrimination has not been a traditional function of labor arbitration. Recognizing that such a form of arbitration was becoming a part of the American landscape, the Academy was a prime mover in what was to become the 1995 multi-partite *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship.* The Academy also amended its constitution and by-laws to encompass study and educational activity with respect to employment arbitration. Although it has continued to limit its membership primarily to those accomplished in traditional labor arbitration, its membership does include some who also serve as employment arbitrators.

In keeping with its educational mission, the Academy has appeared before this Court as *amicus curiae* in cases concerning the law of arbitration under collective agreements, *i.e.*, labor arbitration, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), and *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), in cases concerning the emerging law of the arbitration of individual statutory claims, *i.e.*, employment arbitration, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), and, in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), where the two might conflate. In that case, the Court chose "not [to] reach the question" presented here. *Id.* at 82.

The Academy believes it is specially situated to advise the Court in this case. The Academy's expertise provides the Court a deep understanding of how individual statutory claims relate to the system of industrial self-government of which labor arbitration is so integral a part.

It may appear odd that an association of professional labor arbitrators is advancing a position that would restrict the role of labor arbitration. The seeming oddity evaporates once the Court understands that the Academy's position is grounded in its fundamental educational mission: to bring to bear its experience and considered judgment to the question of what best comports with the nation's system of industrial self-government and of how individual civil rights in employment are best protected.

STATEMENT OF THE CASE

Amicus NAA defers to the Respondents' Statement of the Case[2] but it wishes to draw the Court's attention to three aspects of the instant collective bargaining agreement that play a critical role. First are the Grievance-Arbitration provisions of Arts. V and VI. As a matter of industrial practice, these are in all important respects routine. Art. V sets out the various steps through which a grievance proceeds in an effort at resolution between the union and management short of arbitration, including a contractual statute of limitations. Art. VI governs the submission to arbitration of disputes "between the parties" to the collective agreement. Consistent with the practice and philosophy of collective bargaining, under Art. VI the union and only the union controls whether or not a grievance will proceed to arbitration. THE COMMON LAW OF THE WORKPLACE § 1.29 (Theodore J. St. Antoine ed., 2d ed. 2005); ELKOURI & ELKOURI, HOW ARBITRATION

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[2] The Petitioners have asserted that, under the instant grievance procedure, "the Union permits the employee to pursue the discrimination claims in the arbitration forum with his or her attorney." Petition for Certiorari at 5. The record does not substantiate the use of the present indicative "permits." The collective agreement makes no provision for the individual to proceed to arbitration independent of the union. In this case, the union "consented" on an *ad hoc* basis to the plaintiffs' "use" of the Office of Contract Arbitration (OCA) created under the collective bargaining agreement to hear their age discrimination claim so long as the plaintiffs bore the cost. Pet. App. 42a. That *ad hoc* decision made labor arbitration "available" to these employees. Brief for the Petitioners at 16. But the union was not obligated to allow it. Indeed, the Petitioners recognize as much in their treatment of the avenues of redress available to the employee whose civil rights claims the union declines to pursue. *Id.* at 41–43.

WORKS 243 (Alan Ruben ed., 6th ed. 2003). In labor parlance, "'The grievance belongs to the union.'" Clyde Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, 5 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 453, 487 (2001). A collective agreement could grant employees the right to proceed to arbitration independent of the union, *id.*; but such provisions are extremely rare in the private sector, if they exist at all, and this collective agreement makes no such provision.[3]

Second is the non-discrimination article set out in the Brief for the Petitioners at 5–6. Collective agreements often prohibit discrimination on one or more invidious grounds, but this collective agreement's non-discrimination provision is, in *amicus* NAA's experience, unique. Not only does it enumerate the federal and state labor protective laws it specifically sweeps in, it provides that: "All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the *sole and exclusive* remedy for violations." *Id.* at 6 (emphasis added). The Petitioners argue that "this language" was "specifically crafted" as clearly and unmistakably to preclude de novo judicial access for those statutory claims. *Id.* No reason appears to question this assertion, but the record is silent regarding the provision's bargaining history.

Third is the agreement's treatment of subcontracting. The last major survey of the contents of collective agreements by subject matter, unfortunately now of some vintage, found that about 58% of collective agreements in non-manufacturing dealt with subcontracting: for the most part by reserving it for future bargaining, by prohibiting it if layoffs would result, by allowing it only where bargaining unit employees with necessary skills or equipment were not available, or by requiring adherence to past subcontracting practices. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 80 (14th ed. 1995). Art. 54 of this collective agreement contains an absolute prohibition: "There shall be no subcontracting of bargaining unit work during the term of this Agreement." Joint App. Before the Court of Appeals at A215. This provision bears on the analysis in Section I of the Argument, *infra*.

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[3] *Supra* note 2.

SUMMARY OF ARGUMENT

In *Wright v. Universal Maritime Service Corp.*, *supra*, this Court expressly reserved on whether subsuming civil rights claims into a collective bargaining agreement's grievance-arbitration procedure would preclude access to the courts de novo. *Id.* at 82. That question is presented here.

Amicus NAA submits two propositions to be dispositive. First, the doubt this Court expressed over thirty years ago that statutory civil rights would be protected adequately by mapping them on to the grievance procedures of collective bargaining agreements continues to be well founded. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974). That skepticism is unaffected by the Court's allowance, subsequent to *Gardner-Denver*, of employment arbitration to substitute for civil litigation. Subsuming civil rights for preclusive disposition by a collective agreement's grievance procedure places the vindication of those rights in the hands of the union, subject only to its duty of fair representation. But a union's adherence to a duty of fair representation in deciding not to pursue an employee's civil rights claim is no substitute for an adjudication on the merits of the claim: the vindication of a minority's statutory civil rights should not depend on the dispensation of any majority however well intentioned it might be.

Second, *Gardner-Denver*'s allowance of two separate tracks for the vindication of workplace rights has not proven burdensome. If a collective agreement contains an applicable non-discrimination clause, its administration by the union up to and including non-preclusive arbitration provides a cost-effective system for resolving the vast majority of civil rights claims without sacrificing those few whose claims are arbitrated by their unions negligently or not arbitrated at all.

ARGUMENT

INTRODUCTORY

At first blush, the current state of the law would seem to be anomalous: an unrepresented employee is deemed capable freely to consent to a contract of employment, albeit a contract of adhesion, pursuant to which her statutory civil rights are to be decided definitively by an employment arbitrator instead of a court (where state law would allow such agreement to be enforced[4]), but a union is not free to agree to have the same rights definitively resolved in labor arbitration as the product not of a unilateral managerial fiat but of an arms-length bargain. Consequently, the Court in *Wright v. Universal Maritime Service Corp.*, *supra*, perceived there to be two bodies of law in "tension" with one another—one generated under the Federal Arbitration Act (FAA), the other generated under the National Labor Relations Act. *Id.* at 76. The Petitioners say as much. Brief for the Petitioners at 30–31.

The anomaly is only seeming. The apparent "tension" disappears once it is understood that what is presented are two entirely different systems. The Court is *not* being asked in this case to sanction the submission of civil rights claims exclusively to arbitration under a collective bargaining agreement. The Court is being asked to sanction the submission of those claims exclusively to a collective agreement's grievance procedure that may *not* result in arbitration. Accordingly, it would assist the Court briefly to lay out the underpinnings of the two different systems the Petitioners are asking the Court to conflate.

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[4] *See* Steven Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability and Agreements to Arbitrate*, 2006 J. DISPUTE RES. 469 (reviewing state decisional law).

Labor arbitration is the product of the system of collective bargaining, erected on the statutory foundation of the Wagner Act of 1935, that grew to maturity in the post-War period. In the 1940s and 1950s, as in the 1930s, there were few statutory workplace rights: the common assumption was that workers were entitled only to those rights that unions were able to secure for them.

How to police the parties' self-adopted obligations presented a major legal and societal question. Unions had long tended to eschew the courts, which they distrusted, in preference to self-help; but the strike is a blunt and often awkward instrument and certainly not one to be resorted to frequently or over minor disputes. During the war, management and labor had grown accustomed to dispute resolution by arbitrators, at the behest of the War Labor Board. But even after the war, so experienced a labor umpire as Harry Shulman argued that the law's approach to labor arbitration—premised as "an integral part of the system of self-government"—should be hands off. Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955). The Court accepted Shulman's premise, but instead shaped the law to conform to it.

In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Court held a collective agreement's commitment to grievance arbitration to be specifically enforceable, not, however, by reference to the Federal Arbitration Act, but to § 301 of the Taft-Hartley Act. In the Court's view, § 301 commissioned a uniform federal common law of the collective agreement fashioned by the judiciary out of national labor policy and limited only by judicial "inventiveness." *Id.* at 457. Three years later, in the *Steelworkers Trilogy*, the Court acknowledged labor arbitration as an integral element of the autonomous system of self-government created by the collective bargaining relationship. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers of American v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Court stressed that, unlike the commercial context, where arbitration is a substitute for litigation, in the collective bargaining context labor arbitration substitutes for the strike.

Not surprisingly, because a collective agreement bears scant similarity to a commercial contract or even a contract of employment, the legal nature of the collective agreement proved challenging. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944) (distinguishing the collective bargaining agreement from a "contract of employment"). Scholars differed deeply over whether the collective agreement conferred any individual rights on the employees governed by it at all, or whether the collective agreement was a set of rules and practices that governed the workplace the only legally enforceable aspect of which being an obligation to arbitrate those disputes that the union chose to press. *Compare* Clyde Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1972), *with* David Feller, *The General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973).

In fashioning the federal common law of the collective agreement, the Court accommodated the union's crucial role in the system of industrial collective self-government even as it countenanced the possibility of an accrual of individual contractual rights: the individual employee had first to attempt to exhaust the grievance-arbitration procedure, *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), and could thereafter sue the employer for an alleged breach of contractual rights *only* if she could prove that the union had breached its duty of fair representation either in declining to take her case to arbitration, *Vaca v. Sipes*, 386 U.S. 171 (1967), or in its presentation of the claim in arbitration, *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). That the contractual claim was in fact meritorious is not dispositive of whether the union breached its duty of fair representation in declining to bring it before an arbitrator, *Vaca v. Sipes*, *supra*, at 192–93, such being the union's crucial role in the system.

By the early 70s, however, the legal landscape on which the system of collective bargaining plays out had changed. An expanding number of individual workplace rights were being legislated, especially in statutes prohibiting employment discrimination. How these laws related to the autonomous system of collective bargaining and grievance arbitration was addressed in *Alexander v. Gardner-Denver Co.*, *supra*. The decision need not be rehearsed. It is enough to say that the Court saw two quite different legal regimes at work: the collective agreement policed by the union through the grievance procedure; and positive law policed via litigation in the courts. Where the collective agreement also committed the parties to observe principles of non-discrimination as a contractual obligation, the union's resort to labor arbitration was not preclusive of the individual's resort to the courts: "Both rights have legally independent origins and are equally available to the aggrieved employee." *Gardner-Denver, supra*, at 52.

The *Gardner-Denver* Court addressed the argument that the union had waived the individual employee's access to Title VII and rejected it in part—but only in part—on the ground that statutory rights may not be submitted to private arbitration for final disposition, *id.* at 51–52, citing *Wilko v. Swan*, 346 U.S. 427 (1953). Inasmuch as *Wilko* was overruled in 1989, were it the sole basis of decision, the "tension" adverted to at the outset of this Introductory would be well placed. But there was a good deal more at work in *Gardner-Denver* than *Wilko*'s now discarded notion that law can be decided only by a court. Just as the Court had in the *Trilogy*, the *Gardner-Denver* Court dwelt on the system of self-government created by collective bargaining, *id.* at 52–53, not only on the labor arbitrator's role in that system, *id.*, but, even more importantly, on the union's role. The Court was skeptical that the autonomous system of industrial self-government could be expected to vindicate individual statutory rights, a skepticism grounded in

> the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. . . . Moreover, harmony of interest between the union and the

> individual employee cannot always be presumed, especially where a claim of racial discrimination is made. . . . And a breach of the union's duty of fair representation may prove difficult to establish.

Id. at 58 (citations omitted).

Over the course of the past decade and a half, employer resort to individual contracts of adhesion to sweep statutory civil rights into employer-promulgated arbitration systems has grown apace. Alexander Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPLOYEE RTS. & EMP. POL'Y J. 405, 408–12 (2007). As a result, for many non-unionized employees the judicial track for the vindication of civil rights claims has been substituted for by an arbitral track; but that substitution works no change in the bases upon which *Gardner-Denver* rests. Now, as then, there are two very different regimes:

On the one hand is *employment arbitration*. This is conducted under an individual contract, for the most part addressed by the Federal Arbitration Act governing an individual "transaction involving commerce," 9 U.S.C. § 2, the enforceability of which is determined by state law, *id.*, under which the individual has resort to an arbitrator commonly selected from a special panel of employment arbitrators most often trained in law, Jacquelin Drucker, *The Protocol in Practice: Reflections, Assessments, Issues for Discussion, and Suggested Actions*, 11 EMPLOYEE RTS. & EMP. POL'Y J. 345, 355 (2007), subject to procedures that, as a substitute for litigation, customarily include pre-trial discovery, *e.g.*, American Arbitration Association, National

Rules for Resolution of Employment Disputes, Rule 9 (July 1, 2006), in which proceeding the employee has a right to representation by counsel—the individual employee being the client to whom professional responsibility is owed—*id.*, Rule 19, in which the burdens of proof, often a key element in civil rights litigation, are those the respective parties would bear under the applicable civil rights statute, *id.*, Rule 28, and out of which the full range of statutory relief is expected to be afforded.

On the other is *labor arbitration.* This is the product of a collective agreement—a system of on-going collective self-government, not an individual "transaction," in which access to and the conduct of the arbitration is controlled by the union, not the individual, the enforceability of which is governed by a uniform federal common law of the collective agreement under § 301, not by the FAA or state law, in which claims are heard by persons commonly selected from a special panel of labor arbitrators designated as such, often persons not legally trained, Joseph Krislov, *Entry and Acceptability in the Arbitration Profession: A Long Way to Go*, *in* LABOR ARBITRATION IN AMERICA: THE PROFESSION IN PRACTICE ch. 4 (Mario Bognanno & Charles Coleman eds., 1992) (almost 40% of labor arbitrators are trained in industrial relations, not law), subject to procedures that, grounded in industrial relations, do not include pre-trial discovery, THE COMMON LAW OF THE WORKPLACE, *supra*, at § 1.13, in which a legal representative's professional obligation (*if* there is legal representation) runs to the client union, not to the grievant employee, in which burdens of proof, as a matter of industrial relations, rarely play a role, *id.* § 1.92, at p. 54, and out of which the labor arbitrator is expected to award only such relief as the collective agreement contemplates, *id.* § 10.1.

It is true that both employment arbitration and labor arbitration are called "arbitration." But just as hounds and greyhounds, mongrels and spaniels are all called dogs, *Macbeth*, Act III, scene 1, they're not the same animal.

Consequently, the skepticism the Court expressed in *Gardner-Denver* for the suitability of submitting statutory claims to preclusive resort to a collective agreement's grievance procedure persists—and rightly. The question is not whether employment arbitrators may be deputed by contracts of employment to vindicate statutory civil rights in lieu of the courts. The question is whether the vindication of these rights can be mapped on to the system of collective self-government in which labor arbitration is embedded.

I. A COLLECTIVE AGREEMENT MAY NOT RELEGATE THE VINDICATION OF INDIVIDUAL STATUTORY CIVIL RIGHTS EXCLUSIVELY TO ITS GRIEVANCE PROCEDURE

The question before the Court is *not* whether to give judicially preclusive effect to an agreement that allows an employee to arbitrate his ADEA claim, for that is not what this collective agreement does.[5] The question is whether to give preclusive effect to the submission of ADEA claims "solely and exclusively" to the collective agreement's grievance procedure. The potential end point of that procedure is arbitration; but the union may decline to proceed to arbitration, just as it did here. The union's discretion in making that decision is constrained by a duty of fair representation. But adherence to the duty of fair representation is simply no substitute for a hearing on the merits of the claim.

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[5] *See supra* note 2.

The standards of fair representation are "highly deferential" to the union. *Airline Pilots v. O'Neill*, 499 U.S. 65, 78 (1991). *See generally* ROBERT GORMAN & MATTHEW FINKIN, BASIC TEXT ON LABOR LAW ch. 30 (2d ed. 2004). Crudely, the union may not decline to pursue a grievance out of malice, hostility, discrimination, or bad faith; nor, less crudely, may it "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Vaca v. Sipes*, *supra*, at 191. Before *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990), the courts were at 6s and 7s on how restrictive the test of "perfunctoriness" was. But in *Rawson* the Court resolved that question categorically:

> This duty of fair representation is of major importance, but a breach occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discretionary, or in bad faith." [citing *Vaca v. Sipes*, *supra*] The courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, *and we endorse that view today.*

Id. at 372–73 (italics added).

Thus, the union's refusal to take an employee's grievance to arbitration is wrongful "only if it can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly irrational or 'arbitrary'." *Airline Pilots v. O'Neill, supra*, at 78. A union has "room to make discretionary decisions and choices, even if those judgments are ultimately wrong." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45–46 (1998). For that reason, even success on the merits of the violation, in a hybrid § 301 suit against the employer, does not alone sustain a breach of the duty of fair representation. *Vaca v. Sipes, supra*, at 192–93. As a leading treatise puts it:

> If the union has investigated the case and considered the merits, its refusal to proceed even on the ground that, however "arguable," it was unlikely to prevail before an arbitrator —or even that the outcome was less than encouraging—puts an end to the claim.

GORMAN & FINKIN, BASIC TEXT ON LABOR LAW, *supra*, at 1006 (citing authority). So long as honestly arrived at, a union is free to make a mistaken, flawed, or negligent judgment of whether to proceed to arbitration, of what issues to present if it does proceed or what arguments to make. *E.g.*, *Pease v. Production Workers Union*, 386 F.3d 819 (7th Cir. 2004). As Judge Easterbrook put it, with only a touch of hyperbole, federal labor law expects disputes about the application of collective bargaining agreements to be "resolved by the affected parties over the bargaining table, or by arbitrators knowledgeable about the business, rather than in court. That's why a hybrid contract/DFR suit does not get to first base unless the worker shows that the union has abandoned him to the wolves." *Id.* at 823.

The Petitioners argue that in "today's integrated workforce and diverse unions" the potential of unions intentionally refusing to arbitrate "meritorious discrimination" claims should be discounted. Brief for the Petitioners at 44. That is quite correct, but beside the point. A union's erroneous judgment, doubt, or uncertainty that a violation of a civil right could be proved, arrived at honestly but mistakenly, no matter how well-intentioned, is no substitute for an adjudication of whether an employee's civil rights were actually violated. However well versed the union is in the bargaining history of the collective agreement, however enmeshed in the application of the collective agreement over time giving rise to an accretion of shared meaning and expectation, to the "common law of the shop," that shapes the union's decisions on what contractual grievances to pursue, the union's judgment on whether a statute has been violated is, to say the least, in no way similarly informed.

Although some union locals may follow a grievance screening process that can be trial-like in rigor, LEONARD SAYLES & GEORGE STRAUSS, THE LOCAL UNION 44–45 (2d ed. 1967) (still the authoritative study), such internal procedures are not legally mandated; and pressure from the rank-and-file, one way or another, is part-and-parcel of the grievance screening process, often including voting by the union membership on whether to pursue a grievance to arbitration. *Id.* at 104–05; *e.g.*, *Lee v. Cytec Indus. Inc.*, 460 F.3d 673, 677 (5th Cir. 2006) (pursuant to the union's rules, the failure of the grievant to self-process his grievance to an authorizing vote of the union membership bars his claim). In other words, the duty of fair representation simply cannot be "divorced from the bargaining process," Matthew Finkin, *The Limits of*

Majority Rule in Collective Bargaining, 64 MINN. L. REV. 183, 237 (1980), which is why the Court refused to draw a distinction between contract bargaining and grievance processing in the standards of fair representation. *Airline Pilots Ass'n v. O'Neill, supra.* Simply put: a union would not breach its duty of fair representation if it declines to take the grievance to arbitration because it believes that aggressively advocating a merely arguable or colorable discrimination claim would jeopardize its strategic relationship to the company, *cf. infra* note 7, or because more pressing contractual claims have a higher priority on the allocation of the limited resources the local has available for arbitration.

These are just the kind of judgments the collective's majority and local officers must make. Indeed, the embeddedness of grievance processing in the collective bargaining process, which played so influential a role in *Gardner-Denver*, is placed in stark relief in this case. The grievants' age claim presented two alternative ADEA theories: that the subcontract that caused their reassignment was let by their employer to effect that very end, *i.e.*, because of their age—a disparate treatment theory; or, that irrespective of motive, the decision to subcontract had an age-discriminatory effect and so required proof of reasonable business justification—a disparate impact claim. Note that both theories hinge on the decision to subcontract. But under Art. 54 of the collective agreement, subcontracting of bargaining unit work is absolutely prohibited: management's decision to subcontract could not be made without the union's agreement or acquiescence. Thus, the union's assertion of the employee's ADEA claim in arbitration would, of necessity, challenge its own decision, either directly or consequentially, to allow the subcontract.

The union could have made the decision to permit the subcontract in utmost good faith, honestly, without hostile discrimination or intent to violate the ADEA, but unaware of the disparate impact on these employees. It could accordingly decline to pursue the age claim on an honest but arguably mistaken belief that its decision did not abet the company's alleged discriminatory act. Were *Gardner-Denver* to be abandoned, a union's honest if mistaken and possibly negligent belief in the propriety of management's decision would mean that affected employees would be denied any forum for the vindication of their civil rights.

From a larger perspective, it is understandable that a company would want civil rights claims to be subsumed into the grievance-arbitration procedure of the collective agreement: not only is the prospect of civil litigation ending in a jury trial foreclosed, but the company would bear no liability for wrongful discriminatory conduct if the union does not breach the duty of fair representation in declining to take the claim to arbitration; and, inasmuch as the standard of fair representation is in practice so highly deferential to the union, Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFFALO L. REV. 89 (1985), in practical terms the company's potential exposure would be much reduced and, in some instances, entirely eliminated. Even if the union does fall afoul of the duty in not arbitrating the claim, thereby allowing the lawsuit against the employer to proceed, the union would bear a significant share of any resulting liability. *Bowen v. U.S. Postal Service*, 451 U.S. 212 (1983).

Consequently, the employer would clearly benefit by shifting these risks on to the union; but, concomitantly, a union would be most unlikely to assume the risks of becoming the sole guarantor of the employees' statutory civil rights unless some *quid pro quo* made it worth the union's while. The Petitioner asserts as much here: "[T]he Union gained sizeable wage and benefits enhancements, as well as other favorable provisions, in exchange for its agreement to arbitrate its members' statutory employment claims." Brief for the Petitioners at 6; *id.* at 14 ("It is appropriate for a union to bargain collectively over the method of resolving such claims in exchange for valuable concessions, as occurred here.").

That would have to be the basis of the bargain, and it should be of no effect: an individual's civil rights should be no more disposable by a majority's will—by subsuming them exclusively into the grievance process the majority controls—than they are dispensable by a majority's will, by deciding on a case-by-case basis whose civil rights to vindicate.[6] This is not because the majority might be hostile to the claim or even indifferent to it, but because, even if the grievance is investigated with painstaking care and in utmost good faith, other concerns relevant to the union's role in collective bargaining may persuade it against pressing the grievance to arbitration.

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[6] The Petitioners advert to the fact that rights granted by the Labor Act to further the process of collective bargaining may be relinquished by collective agreement. Brief for the Petitioners at 23–24. However, that says nothing about those individual civil rights that are insulated from majoritarian control; and, it should be noted, even some statutory rights that inhere in the system of collective representation are insulated from majoritarian dispensation. Matthew Finkin, *The Limits of Majority Rule in Collective Bargaining*, *supra*, at 190–91 (observing that not only "external law" but certain aspects of the Labor Act "are insulated from disposition by a majority," and discussing *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974)).

II. *GARDNER-DENVER* PLACES NO BURDEN ON EMPLOYERS

Rather early on, critics of *Gardner-Denver* thought it gave unionized employees "two bites on the apple" of civil rights protection. This was addressed in the still leading study by Michele Hoyman and Lamont Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, 39 ARB. J. 45, 57 (Sept. 1984), more on which below. The "two bites" criticism has recurred in the wake of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); that is, because non-unionized employers may adopt employment arbitration for the definitive disposition of their employees' civil rights claims while unionized employers may not sweep those claims into labor arbitration for definitive disposition, the maintenance of two distinct tracks for the protection of civil rights in the latter employments is perceived to be burdensome to unionized employers, if only in comparison.

It is true that non-unionized employers have sought employment arbitration because they see it as more advantageous to them than civil litigation: the process is swift, informal, inexpensive, and of low visibility. As the Petitioners quite rightly argue, these advantages are also accommodated in the unionized workplace where contractual discrimination claims can be conjoined with other contractual claims and both might be resolved satisfactorily in a single proceeding. Brief for the Petitioners at 26–30. But none of these advantages requires that preclusive effect be given to the decisions of labor arbitrators when treating statutory civil rights. Let us look more closely at how the system actually works.

Under *Gardner-Denver* and *Vaca v. Sipes*, a union is free to select those grievances it will take up through the grievance procedure. If it chooses not to pursue a discrimination claim to arbitration the grievant is free to pursue her claim in court. But if it does choose to take it up, the process can be swift (subject, as here, to a contractual statute of limitations), informal (a series of steps is commonly provided, as here, in which the facts and circumstances can be aired), costless to the grievant, of low public visibility, and, for contractual purposes, final; but only those intractable cases about which the union is strongly motivated will actually go to arbitration.[7]

If the union prevails in arbitration on the contractual discrimination claim the matter would be at an end, assuming an effective remedy is afforded the grievant. If the union does not prevail, the individual grievant may avail herself of legal relief de novo, though the arbitration decision can be given weight as evidence in the later civil proceeding. *Gardner-Denver Co.*, *supra*, at 60 n.21. For that employee the system functions as, in effect, one of advisory arbitration. Akin to some other pre-trial alternative dispute resolution devices, such as "mini trials," the employee (and her lawyer) secures a sense of how a neutral adjudicator would assess the strength of her claim and is in a better position to judge whether further legal recourse de novo would be worth the candle.

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[7] The substitution of employment arbitration for the courts is premised on the assumption that employees are all too often unable to secure legal representation where "the stakes are too small and outcomes too uncertain." Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. DISP. RES. 559, 563 (2001). But it is in just that category of case—where the outcomes are most uncertain—that the duty of fair representation is most deferential to union refusals to proceed to arbitration. Section I, *supra*. Thus, the relegation of these employees to the exclusive resort to the union would be antithetical to the fundamental policy assumption of employment arbitration, which is to make it possible for just those kinds of claims actually to be heard.

The leading study on how the dual track system actually works surveyed practitioners for case disposition in the immediate period after *Gardner-Denver*, 1974–1981; there has been no more recent research. In this study's sample, 1,761 grievances involving employment discrimination had been arbitrated under collective agreements. Of these, 307 (17%) were relitigated; 21 of these (6.8%) resulted in judgments that differed from the arbitral disposition. Michele Hoyman & Lamont Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, *supra*. In other words, in the vast majority of cases (83%) the employee either prevailed in arbitration or, having lost, decided against relitigating the claim. Though diligent research has revealed no more recent data, *amicus* NAA has no reason to believe the relitigation rate has significantly increased; in fact, the very want of research interest suggests the absence of a pressing problem. It is most plausible that, the more experience lawyers have had since 1984, the more employees are likely to be counseled of the unlikelihood that they will be successful contrary to the labor arbitrator's disposition and the less likely will the employee be to incur the costs of further judicial resort. Indeed, the Court's allowance of the arbitration award into evidence in such a case serves as just such a sobering caution. *Gardner-Denver*, *supra*, at 60 n.21.

Consequently, de novo litigation would be availed of under *Gardner-Denver* only by those relatively few unionized employees who believe so strongly that their civil rights had been violated that they are willing to incur the costs of securing legal counsel to pursue that resort despite an arbitral determination to the contrary. The 7% who relitigate and succeed in court contrary to the labor arbitration, while scarcely enough to encourage de novo litigation, is not an insignificant figure from the perspective of vindicating civil rights. But, more important, under *Gardner-Denver* judicial resort remains available to those unionized employees whose claims are not pursued by their unions to arbitration without breach of the duty of fair representation.

Amicus NAA submits that this state of affairs is scarcely unduly burdensome to employers:[8] in the case of employees whose claims are not resolved to their satisfaction in arbitration, the "second bite," if such it be—*see* Conclusion, *infra*—is infrequently taken; but when it is employees prevail to a small but not insignificant extent. In the case of employees whose claims have not been taken to arbitration, there will have been no "first bite" to begin with.

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[8] Petitioners argue that unless preclusive effect is given unionized employers will "cut unions out of the process" by exercising their "well established" right to impose employment arbitration unilaterally. Brief for the Petitioners at 32, citing the only decision on point thus far, arising under the Railway Labor Act, not the National Labor Relations Act, *see Air Line Pilots' Ass'n Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999). Two observations should suffice. First, a solitary decision on a novel proposition does make the law "well established." In fact, the National Labor Relations Board has yet to pass on the question the analysis of which is actually rather complicated. GORMAN & FINKIN, BASIC TEXT ON LABOR LAW, *supra*, at § 21.9. Second, and closely related, the fact that

As the Petitioners candidly recognize, were *Gardner-Denver* to be abandoned, the only recourse for employees whose claims were not arbitrated is either: (1) to persuade the Equal Employment Opportunity Commission (EEOC) to litigate on their behalf, Brief for the Petitioners at 43; or (2) to bring § 301 hybrid claims that condition the vindication of the civil right on the employee's success in a claim of breach of the duty of fair representation, *id.* at 42–43. The EEOC would not be expected routinely to litigate on behalf of every discriminatee who fails to persuade her union to take her case. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002). Nor, in view of the high degree of deference given unions, Section I, *supra*, would we expect a significant number of employees to prevail in § 301 suits, no matter how meritorious the statutory claim turns out to be, for want of breach of the duty of fair representation.

In practical effect, employees whose civil rights claims are not arbitrated have scant recourse. In that sense, the Petitioners are clearly correct: as to those whose civil rights are not arbitrated, the law,

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there has been only one litigated instance of this occurring indicates that unionized employers have encountered no great burden as a result of *Gardner-Denver*'s continuing vitality; they have seen no need to take that action in the decade and a half since *Gilmer*.

as they would have it, would be less burdensome to employers. But it is equally clear that the law would be commensurately less protective of civil rights.

CONCLUSION

Today, as in 1974, we have two separate systems, differently derived and differently administered, that create and vindicate rights in the unionized workplace—external law and collective self-government. To borrow from *amicus* NAA's brief to this Court in *Wright v. Universal Maritime Service Corp., supra*, unionized workers do not have "two bites" at the workplace rights apple, they have two different apples. That is scarcely anomalous; indeed, this Court has recently reemphasized *Gardner-Denver*'s observation that employment discrimination legislation has "'long evinced a general intent to accord parallel or overlapping remedies.'" *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (quoting *Gardner-Denver*, *supra*, at 47). These separate systems have worked well in tandem for more than thirty years. In *amicus* NAA's judgment, it would disrupt the system of industrial self-government—and do damage to the vindication of civil rights—to conflate them.

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14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF AMICUS[1]

The National Employment Lawyers Association ("NELA") is the only professional membership organization in the country comprised of lawyers who regularly represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are representing and have represented hundreds of thousands of individual employees who have suffered violations of their statutory rights in employment. NELA strives to ensure the rights of employees to the protections afforded by statutes setting minimum standards for employment.

The American Association for Justice ("AAJ") is a voluntary, nation-wide association of trial lawyers who primarily represent plaintiffs in personal injury, civil rights, employment rights, and consumer litigation. AAJ's 50,000 attorney members are committed to the preservation of access to the courts and to the right of trial by jury. Those fundamental individual rights may be waived, AAJ believes, only by a knowing and voluntary choice by the individual affected.

American Association of Retired Persons ("AARP") is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce the[illegible] More than half of AARP's nearly 40 million mem[illegible] are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), Title VII, the Americans with Disabilities Act, as well as by other federal and state work place civil rights laws. Vigorous enforcement of these laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Amici, thus, have a strong interest in ensuring that the goals of the are fully realized. NELA and AARP have filed numerous *amicus curiae* briefs before the United States Supreme Court and the federal appellate courts regarding the proper interpretation of the ADEA, *see, e.g.*, *Kentucky River Retirement Systems v. EEOC*, 128 S.Ct. 2361 (2008); *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008); *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Adams v. Florida Power Co.*, 535 U.S. 228 (2002), and regarding arbitration of claims arising under statutes governing employment, *see, e.g.*, *EEOC v. Wafflehouse*, 534 U.S. 279 (2002); *Circuit City v. Adams*, 532 U.S. 105 (2001); *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Amici's particular interest here is to ensure that the necessary boundary between collective bargaining and the adjudication of civil rights and other statutory minimum employment standards which this Court acknowledged in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), is maintained. That boundary is necessary in accomplishing congressional purposes inherent in both statutory arenas, and essential to the preservation of fundamental civil rights and the minimum employment standards set by federal and state statutes.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that an arbitration award obtained by a union through collectively bargained arbitration did not have preclusive effect on a bargaining unit member's individual right to a judicial forum for adjudicating his right under Title VII of the Civil Rights Act of 1964 to be free from race discrimination. In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 76-77 (1998), the Court noted "some tension" between the decision in *Gardner-Denver* and *Gilmer*, 500 U.S. 20 (holding that an individual non-union securities broker's agreement to arbitrate "any controversy" in a securities dealer's registration application required the broker to arbitrate his claim of age discrimination).

Whatever *Gilmer* may have said about an individual's prospective agreement to waive his right to a judicial forum, *Gardner-Denver* held specifically that unions may not prospectively waive their unit members' access to judicial forums for statutory claims through a collective bargaining agreement.[2] The Court relied on longstanding statutory interpretation embedded in decades of this Court's jurisprudence that continues as sound law today. Nothing in the developing interpretation of the Federal Arbitration Act ("FAA") "ha[s] removed or weakened the conceptual underpinnings from" the long line of cases in which *Gardner-Denver* is simply a mid-point; nor has the recent interpretation of the FAA in the non-union setting "rendered the decision [in *Gardner-Denver* and its progeny] irreconcilable with competing legal doctrines or policies. . . ." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

Although in *Gilmer*, 500 U.S. at 26, the Court explained that an individual's waiver of a judicial forum is not a waiver of "substantive rights afforded by the [applicable] statute," that holding does not imply that the decision to waive that forum can be exercised by anyone other than the individual. Individual employees are not parties to collective bargaining agreements. "It goes without saying that a contract cannot bind a nonparty." *EEOC v Wafflehouse*, 534 U.S. 279, 294 (2002). Significantly, individual choice in a decision to execute that waiver is not negated by unions' statutory representational status as collective bargaining agents, as is explained below.

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[2] In *Wright*, 525 U.S. at 77, the Court acknowledged this distinction between the holding in *Gilmer* and *Alexander's* holding that "federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts–a distinction that [the Court observed] assuredly finds support in the text of *Gilmer*, *see* 500 U.S., at 26, 35."

In *Gardner-Denver*, as here, the collective bargaining context is dispositive. *Gardner-Denver* accurately reflected, and continues to reflect, the law governing the limits on unions' ability to act for their bargaining unit members and Congress' intent that civil rights and minimum employment standards be adjudicated in a manner that does not compromise those important personal civil rights and minimum employment standards. In the collective bargaining grievance and arbitration process the claimant does not decide whether, or how far to pursue the claim. And, if the claim is pursued, the union advocate is not acting solely in the employee's interest and is accountable only to the union. Submitting statutory civil rights and minimum employment standards claims to such a process is inconsistent with maintaining substantive civil and statutory rights.

ARGUMENT

I. SUBSTANTIVE FEDERAL LABOR LAW, NOT THE FEDERAL ARBITRATION ACT, GOVERNS WHETHER A COLLECTIVE BARGAINING AGREEMENT MAY CONSTITUTE A WAIVER OF BARGAINING UNIT MEMBERS' RIGHTS TO SELECT A JUDICIAL FORUM FOR STATUTORY CLAIMS.

Petitioners rely primarily on the FAA, 9 U.S.C. §§ 1-16, to contend that their employees are bound by an agreement Petitioners made, not with their employees, but with the union representing the employees' bargaining unit for purposes of collective bargaining. This reliance is misplaced. It is not at all clear that the FAA applies in this controversy, but certainly federal labor statutes do. *See Wright*, 525 U.S. at 77, n.1 (declining to decide the applicability of the FAA to a collective bargaining arbitration agreement because the employer did not rely on the FAA). *Amici* submit that this Court's previous decisions foreclose application of the FAA here, and even if the FAA does apply, it simply provides a jurisdictional overlay to Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185 ("§ 301"), and the substantive law developed by the federal courts under that statute.

In *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), the union brought suit under § 301, seeking an order compelling arbitration under a collective bargaining agreement, contending that § 301 alone was sufficient to provide the Court with jurisdiction and the power to issue the desired order. As an alternative argument, the union asserted that § 2 of the FAA could also provide jurisdiction for suits to compel labor arbitration agreements. As part of that alternative argument, the union argued that a collective bargaining agreement is not a "contract of employment" within the meaning of the exclusion in § 1 of the FAA, or that, if it were a contract of employment, the exclusion is limited to transportation workers.[3] *See* Brief of Petitioners Textile Workers, 1957 WL 87026 (U.S.), *passim*. The Court did not explicitly address either alternative argument. Instead, the Court stated that "the starting point of our inquiry is § 301 of the Labor Management Relations Act of 1947. . . ." Agreeing with the union's principal argument, the Court ended where it started, holding that § 301 provided the authority to compel the arbitration the union sought. *Lincoln Mills*, 353 U.S. at 449, 454-57.

"Plainly, [§ 301(a)] supplies the basis upon which the federal district courts may take jurisdiction and apply the procedural rule of § 301(b)" to provide injunctive relief compelling arbitration. *Lincoln Mills*, 353 U.S. at 451-52.[4] In § 301 the "Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes. . . ." *Id.*, 353 U.S. at 456. Congress enacted those sanctions to achieve the overarching goals of federal statutory labor policy: encouraging collective bargaining and providing effective methods for resolving labor disputes without the resort to economic weapons during the term of the resulting collective bargaining agreement. *Id.* at 453-54. *See also* 29 U.S.C. §§ 141(b), 173(d). Thus,

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[3] *See* Appendix ("App."). at 1 for text of 9 U.S.C. § 1.

[4] *See* App. at 3-4 for text of 29 U.S.C. § 185.

"the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456.

Justice Frankfurter, in dissent, rightly noted the majority's implied rejection "of the availability of the [FAA] to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion." *Id.* at 466 (Frankfurter, J., dissenting). Although Justice Frankfurter surmised that the majority had based its decision on the exemption for employment contracts in § 1 of the FAA, *id.*, the majority certainly did not state that ground for its holding. The exemption for employment contracts (however broadly or narrowly it may have been understood by various lower courts at the time) was an unlikely basis for the majority's failure to rely on the FAA. In a previous decision, the Court had explained that collective bargaining agreements were not contracts of employment:

> Collective bargaining between employer and . . . a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone.[5]

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[5] Indeed, many lower court rulings at that time, although interpreting the exemption to apply to all individual employment contracts, did not interpret that term to apply to collective bargaining agreements. *See, e.g.*, *Electrical Workers (UE) Local 205 v. General Elec. Co.*, 233 F.2d 85, 98-100 (1st Cir.

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J.I. Case Co. v. NLRB, 322 U.S. 334-35 (1944) (holding that CBAs are negotiated regulatory systems similar to trade agreements); *See also Acuff v. United Papermakers and Paperworkers, AFL-CIO*, 404 F.2d 169, 172 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969) (denying employee grievant's intervention motion seeking to vacate a collective bargaining arbitration award because the right to arbitration is an incident not of the employment relationship but of the collective bargaining relationship).

Lincoln Mills' reliance on § 301 was premised on Congress' clear intent to place suits to enforce agreements to arbitrate, which are part and parcel of the labor peace bought by collective bargaining grievance arbitration agreements, squarely within the ambit of the LMRA and the broader National Labor Relations Act, as amended by the LMRA. That statutory scheme superseded the FAA's application, if any, to collective bargaining arbitration agreements.[6] As one of the authors of the union's brief in *Lincoln Mills* explains, although lower courts had rightly held that

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1956), *aff'd on § 301 grounds*, 353 U.S. 547 (1957) (court of appeals' decision in a *Lincoln Mills* companion case decided the same day). *Hoover Motor Exp. Co. v. Teamsters Local 327*, 217 F.2d 49, 52-53 (6th Cir. 1954); *Lewittes & Sons v. United Furniture Workers of America, C.I.O.*, 95 F. Supp. 851, 855-56 (D.C.N.Y. 1951).

[6] This reading of *Lincoln Mills* is consistent with the intent of Congress, expressed in the FAA as enacted in 1925, to avoid unsettling arbitration systems, including labor arbitration, had already been, or were about to be, put into place. *Circuit City v. Adams*, 532 U.S. at 120-121.

collective bargaining agreements were not contracts of employment and thus (as understood at the time) not exempted from the FAA, the Court did not choose to apply the FAA to collective bargaining arbitration agreements. Rather, in order to achieve the goals of federal labor statutes, the Court "rest[ed] the enforcement of the promise to arbitrate, and the enforcement of awards once made, on federal labor policy," under § 301. *See* David E. Feller, *Taft And Hartley Vindicated: The Curious History Of Review Of Labor Arbitration Awards*, 19 Berkeley J. Emp. & Lab. L. 296, 300-301, and 306, n. 23. (1998).

Perhaps because the rejection of the FAA was only implicit in comparison to *Lincoln Mills'* explicit holding that § 301 applied, there has been ongoing "division and doubt" as to whether the FAA applies to collective bargaining arbitrations. William B. Gould, *Kissing Cousins?: The Federal Arbitration Act And Modern Labor Arbitration*, 55 EMORY L.J. 609, 639 (2006) (describing cases). That division and doubt continues, perhaps encouraged by an exchange between the majority and dissenting opinions in *Circuit City*, which held that the FAA applied to individually executed arbitration agreements in employment contracts outside the transportation industry. The dissenting Justices referred to legislative history and this Court's previous decision in *Lincoln Mills* as support for the proposition that the FAA does not apply to arbitration agreements in employment contracts. *Circuit City*, 532 U.S. at 130-131 (Stevens, J., dissenting). In response, the majority opinion rejected reliance on legislative history, but did not assert that the Act applied to collective bargaining agreements to arbitrate, which of course was not at issue. *See id.*, 532 U.S. at 119-121.

Because collective bargaining agreements are not contracts of employment, *Circuit City*'s holding that the FAA extends to all contracts of employment outside the transportation industry does not undercut the holding of *Lincoln Mills*, which is not dependent on any particular reading of the exemption, but rather is firmly grounded in effectuating federal labor policy through § 301 and the substantive law developed under it.[7] The current dispute presents the Court with an opportunity to end the division and doubt apparently remaining after *Lincoln Mills*.[8] It should answer the question left open in *Wright* by holding that the FAA has no application where, as here, the question presented concerns the effect of arbitration provisions contained in collective bargaining agreements. Those agreements are governed by federal labor statutes designed to facilitate ongoing negotiation between management and unions advancing the collective interests of workers. The goal of those statutes is not resolution of individual statutory claims, but rather meaningful collective bargaining and the peaceful resolution of conflicts in collective bargaining relationships. *See Mastro Plastics*, 350 U.S. at 280 (*citing* 29 U.S.C. § 141(b) (LMRA declaration of policy) and 29 U.S.C. § 151 (NLRA declaration of policy)).[9]

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[7] Three years after the decision in *Lincoln Mills*, in the famous "*Steelworkers Trilogy*," the Court explained in greater detail that collective bargaining agreements are a feature of an integrated statutory design implementing Congress' policy goals concerning labor-management relations, and labor arbitration agreements must be governed by the LMRA to give effect to that policy. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigating Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.* 363 U.S. 593 (1960).

[8] Regardless of whether the courts hold that the FAA applies in any way to collective bargaining arbitration agreements, there is universal consensus that the substantive law developed under § 301 also applies. *See Wright*, 525 U.S. at 77, n.1, 79-80 (holding that if a union could waive an individual bargaining unit member's statutory right originating outside the NLRA, the "clear and unmistakable" standard developed in § 301 jurisprudence would apply). *See also, e.g.*, *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319 (4th Cir. 1999); *Wilson v. Kellogg, Brown & Root*, 525 F.3d 370, 381-82 (4th Cir. 2008).

The congressional policy applicable here has nothing to do with the FAA's enforcement of an individual's prospective agreement to waive the right to a judicial forum for resolution of any statutory claims arising out of employment. If those were the facts of this case, the relevant inquiry would be whether under governing New York law the Petitioners' agreement with their employees to arbitrate statutory claims was valid and therefore enforceable by resort to the FAA. But, of course, here the only agreement is between a union and management and is embodied in a collective bargaining agreement, and state law is preempted by § 301.

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[9] Indeed, contrary to the assertion of Petitioners and *amici* supporting them, the Second Circuit's decision below was not premised on judicial skepticism concerning arbitration that the Congress intended the FAA to extinguish. Its decision was based on the understanding that, despite the long and successful history of collective bargaining arbitration, that forum is not appropriate for individual claims arising from statutes external to the federal labor arena. Federal labor policy allows unions to compromise individual claims in pursuit of collective bargaining goals, a key to the success of labor arbitration, and precisely the characteristic that makes it unsuitable for claims arising from statutes outside the NLRA. *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88, 94 n.5 (2nd Cir. 2007), *cert. granted*, 128 S. Ct. 1223 (2008).

Here, the Court must decide whether the right of a collective bargaining representative to act on behalf of its bargaining unit includes the ability to foreclose an individual employee's right to pursue a violation of fundamental civil rights and legislated minimum employment standards in a judicial forum. The answer to that question lies in this Court's previous decisions concerning the authority of unions to act for their members and the intent of Congress to insulate civil rights and statutory minimum standards from diminution by collective bargaining, including by the grievance and arbitration process under collective bargaining agreements.

II. A UNION'S AUTHORITY TO ACT FOR UNIT MEMBERS EXISTS ONLY FOR COLLECTIVE BARGAINING PURPOSES AND DOES NOT INCLUDE THE POWER TO WAIVE UNIT MEMBERS' RIGHTS TO SELECT A JUDICIAL FORUM FOR ADJUDICATING CIVIL RIGHTS CLAIMS OR VIOLATION OF MINIMUM EMPLOYMENT STANDARDS.

In *Gardner-Denver*, the Court had been asked, in essence, to rule that a collective bargaining agreement could waive a bargaining unit member's right to enforce his substantive statutory right to be free from discrimination and replace it with a contractual non-discrimination provision, enforcement of which would be in the union's control through the collective bargaining process. The Court rejected that request, for two reasons that remain vital to interpretation of the statutes involved. First, the Court recognized that unions do not have the authority under the NLRA to waive bargaining unit members' statutory rights outside the NLRA arena. Secondly, even if the NLRA provided authority for unions to execute such waivers, accommodation of the NLRA to Title VII would prohibit such waivers.

The Court acknowledged "that a union may waive certain statutory rights related to collective activity, such as the right to strike." *Gardner-Denver*, 415 U.S. at 51, *citing Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), and *Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970). However, the Court noted a dispositive distinction between NLRA rights that a union may waive and statutory rights arising outside federal labor relations statutes, concerning which unions have no representative status. Rights that unions are authorized to waive, Congress "conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members." *Gardner-Denver*, 415 U.S. at 51. In contrast, rights conferred by civil rights and minimum employment standard statutes are not the means to a collective bargaining end. Congress intended by those enactments to achieve equality of opportunity and minimally decent employment conditions that would not be diluted by collective bargaining. Therefore, although the Court recognized that contractual provisions concerning those same subjects were mandatory subjects of bargaining and enforceable in their own right, they were simply complementary to statutory rights. *Id.*

The concern that the collective bargaining context was inherently incompatible with the adjudication of rights originating in law was the gravamen of the holding in *Gardner-Denver:*

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. *In these circumstances*, an employee's rights under Title VII are not susceptible of prospective waiver.

415 U.S. at 51-52 (emphasis added). *Gardner-Denver* accurately described the grievance and arbitration process under a collective bargaining agreement as simply an extension of the continuous negotiation and compromise that is characteristic of labor relations. Federal labor policy encourages negotiated and negotiable standards in order to achieve peaceful resolution of labor disputes. *See also H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (government is to regulate only the process, and not the substance, of collective bargaining); *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960) (Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences").

However, that process is not, as has been repeatedly recognized by this Court, suitable for effective enforcement of civil rights or statutory minimum standards that may not be undercut by collective bargaining or left for enforcement by a representative not acting solely in the interest of the individual claimant.[10]

A. A Collective Bargaining Representative's Authority Extends Only To Collective Bargaining Purposes And Is Constrained By Statutory Purposes.

Determining the reach and effect of agreements to arbitrate contained in collective bargaining agreements requires recognition that those agreements are only one of many interwoven attributes in a complex statutory scheme reflecting "the manifest purpose of the Congress to fashion a coherent national labor policy." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-81 (1967) (internal quotation omitted).[11] Examination of those interwoven attributes reveals that a union's authority to act on bargaining unit members' behalf is limited to actions in furtherance of collective interests and contained within the statutory labor relations arena.

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[10] Of course, because these civil rights and minimum employment standards embody important social policy, many of them are also enforceable by administrative agencies empowered by Congress or the states to enforce their standards. *See, e.g.*, *Wafflehouse*, 534 U.S. 279. Moreover, because individual access to the courts to enforce these important rights implicates individually centered rights, *City of Los Angeles v. Manhart*, 435 U.S. 702, 708 (1978), and the individual's right to petition the court and have a jury trial, any waiver of those rights must be voluntary, knowing, clear and unmistakable.

[11] The applicable statutory scheme here is the National Labor Relations Act of 1935 ("NLRA"), 49 Stat. 449 (1935), 29 U.S.C. §§ 151-163, as amended and supplemented in 1947 by the LMRA, 29 U.S.C. §§ 141-144, 167, 172-187, and in 1959 by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 401 *et seq.*

The federal policy favoring collective bargaining and industrial self-government is

> [p]redicated on the assumption that individual workers have little, if any, bargaining power, and that 'by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions[.]'

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 735 (1981) (*quoting Allis-Chalmers*, 388 U.S. at 180). Once the unit of employees has selected a union as a collective bargaining representative, that representative acts as the legislative and executive branches of a government would in determining the collective bargaining goals and priorities, and in negotiating, executing and administrating a collective bargaining agreement. *Allis-Chalmers*, 388 U.S. at 180, *quoting Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944). The result of collective bargaining is not a contract reflecting the legal obligations of the parties; it is the parties' "own charter for the ordering of industrial relations" and the means "to minimize industrial strife" during its term. *Teamsters v. Oliver*, 358 U.S. 283, 295 (1959).

Unions may bind their unit members to the outcomes reached by the union in both negotiating and administrating the collective bargaining agreement because that is necessary to the successful operation of the federal policy requiring one voice for employees vis-à-vis their employer concerning wages, hours and working conditions. The source of unions' power to act on behalf of their bargaining units is found in 29 U.S.C. § 159 (a), which states that they "shall be the exclusive representatives of all the employees in such unit *for the purposes of collective bargaining* in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." (emphasis added). Collective bargaining is "the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . . ." 29 U.S.C. § 158(d).[12]

Collective bargaining then includes negotiation over the mandatory subjects of wages, hours and conditions of employment. Other terms of employment may constitute permissive subjects of bargaining, but neither side can obligate the other to negotiate concerning them. Still other subjects are deemed illegal subjects of bargaining. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Thus, the scope of a union's authority to bind its members is limited to agreements with their employer concerning mandatory or permissive subjects.

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[12] *See* App. at 2-3 for text of these statutes.

Permissive subjects of bargaining include a union's agreement to waive certain rights that inhere in the federal labor laws themselves. In order to achieve its collective bargaining goals a union may negotiate away, for the term of the collective bargaining agreement, even statutory rights or obligations that form the rules of the collective bargaining game. There are, however, two significant caveats to a union's ability to waive its unit members' statutory rights: First, the union's authority does not extend to rules that ensure that employees have a free choice in forming or selecting their union. Secondly, the union's authority does not extend to statutory rights that are not part of the collective bargaining game. The distinction between what rights a union may waive and those over which unions have no power is dependent upon the legislative purpose for the right's existence.

In order to achieve its goals, a union does have the authority to trade away certain rights belonging to individual bargaining unit members under the statutory rules of the collective bargaining game. But that authority is limited to certain very specific situations, and even then only where those rights relate to the collective activity inherent in federal labor laws. A union may be authorized to waive the rights of unit members to engage in concerted activity for collective bargaining purposes, which are statutory rights belonging to the individual employee under Section 7 of the NLRA, as amended, 29 U.S.C. § 157.[13] Section 7 rights differ significantly from statutory rights outside the federal labor statutes. Section 7 rights are a means to an end, not the end itself. Congress enacted § 7 rights to further the ability of employees to act concertedly in choosing and supporting a bargaining representative that will reflect their collective power in negotiating with the employer. They are "protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.' 29 U.S.C. § 151." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1975). Therefore, because the union controls collective bargaining for its members, in most circumstances it controls whether to waive § 7 rights.

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[13] *See* App. at 1-2.

Because § 7 rights are ordinarily exercised as tools to reach an economic result through collective bargaining, the union may limit or waive those rights for the duration of a collective bargaining agreement in trade for concessions by management. The legitimacy of waivers for economic purposes "rest[s] on 'the premise of fair representation' and presuppose[s] that the selection of the bargaining representative 'remains free.'" *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974), *citing Mastro Plastics Corp.*, 350 U.S. at 280. The quintessential trade is the ubiquitous no-strike clause for the equally ubiquitous grievance and arbitration process for resolving contractual disputes. *See, e.g., Magnavox*, 415 U.S. at 358 (a union may reach an agreement as to wages and other employment benefits and waive the right to strike during the time of the agreement as the quid pro quo for the grievance and arbitration procedure to resolve disputes about the meaning and application of the agreement) (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455);

Local 174, Teamsters v. Lucas Flour, 369 U.S. 95 (1962)) (contract provision establishing that a dispute shall be settled exclusively and finally by compulsory arbitration makes clear that the union may not strike over such a dispute because waiver is implied in the unique conjunction between arbitration and no-strike clauses).

Similarly, a union may agree that the employer may discipline union representatives more harshly than other employees for failing to take affirmative steps to end an unlawful work stoppage. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983). Unions may execute such waivers of the right to be free from discipline because of concerted activities because they are closely related to the original economic decision to waive the right to strike and to the concomitant peaceful resolution of contractual disputes during the term of the collective bargaining agreement.[14] *See, e.g., Energy*

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[14] Petitioners, and *amici* in their support, rely on *Metropolitan Edison* as authority for Local 32BJ's ability to waive Respondents' access to a judicial forum for their ADEA claims. This facile comparison completely misses key distinctions. First, in *Metropolitan Edison*, the right in question was the quintessential economic § 7 right to strike. Here, the Respondents' rights accrue under the ADEA, not the NLRA, and are therefore not within the union's arsenal of collective bargaining weapons. Second, there, the union's right to execute a waiver of its own leaders' § 7 rights not to be disciplined more severely than other employees who violated a no-strike agreement was premised on the fact that the waiver was made to "secure the integrity" of the contractual "[n]o-strike provisions [so] central to national labor policy." *Metropolitan Edison*, 460 U.S. at 707. The union's waiver in that case must also be understood in light of the ability of the union to discipline

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Co-op., 290 NLRB 635 (1988) (holding that a union's ability to waive statutory rights is limited to rights closely associated with economic warfare rights, like the right to strike, here the right to receive benefits while on strike).

However, sometimes employees exercise their § 7 right to strike, not as a tool of economic warfare in support of contract negotiations, but to protest unfair labor practices by their employer. Because the right to resort to economic warfare in response to unfair labor practices is not the quid pro quo for arbitration of contractual violations, the National Labor Relations Board and the courts will not find a waiver unless it is clear and unmistakable that the union intended the waiver to extend to unfair labor practice strikes. *See, e.g.*, *Mastro Plastics*, 350 U.S. 270 (1956); *Lucas Flour*, 369 U.S. 95; *NLRB v. Advanced Architectural Metals, Inc.*, 351 NLRB No. 80 (2007).

Although a union may waive statutorily protected economic rights of its members, such as the right to strike during a contract term or the right to refuse to

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its own members for violating the union's promise not to strike, *see Allis-Chalmers*, 388 U.S. 175. Here, even if unions could waive non-NLRA rights, there is no nexus between the purported waiver of judicial forum for statutory claims and the union's ability to waive the Respondents' right to strike or any other § 7 right that a union might legitimately waive. Finally, an individual employee's ability to choose the forum for adjudicating civil rights is necessary to enforcement of those statutory schemes and may not be compromised by collective bargaining. *See infra* Parts II. B & C.

cross a picket line, "it may not surrender rights that impair the employees' choice of their bargaining representative." *Metropolitan Edison Co.*, 460 U.S. 693, 705-06. That would undermine the purposes of the NLRA, which are "(1) to protect the right of employees to be free to take concerted action as provided in §§ 7 and 8(a), and (2) to substitute collective bargaining for economic warfare in securing satisfactory wages, hours of work and employment conditions." *Mastro Plastics*, 350 U.S. at 284. For example, the right to distribute literature at the workplace supportive or critical of the incumbent union is only indirectly related to placing pressure on an employer, but it is crucial to a unit member's statutory right to have a say in the selection of his or her union. A union may not waive this right by negotiating a collective bargaining agreement provision that precludes employees from soliciting support or criticism of the union and distributing literature about the union in the workplace. *Magnavox*, 415 U.S. at 325. Thus, while federal labor policy encourages collective bargaining, it must be balanced with the policy of "'protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . .'" *Mastro Plastics*, 350 U.S. at 280, *quoting* 29 U.S.C. § 151 and citing 29 U.S.C. § 141(b). The Court explained that the "two policies are complementary [and] depend for their foundation upon assurance of 'full freedom of association'." *Mastro Plastics*, 350 U.S. at 280, *quoting* 29 U.S. C. § 141(b).

When the right to choice of representative is at issue, "it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative." *Magnavox*, 415 U.S. at 325. Allowing the union with such self-interest to secure a contractual waiver of the bargaining unit's right to solicitation would "seriously dilute § 7 [which] protects 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.' 29 U.S.C. § 151." *Magnavox*, 415 U.S. at 325-26. *Accord, General Motors Corp.*, 211 NLRB 986 (1974), *enforced in relevant part*, 512 F.2d 447 (6th Cir. 1975); *Ford Motor Co.*, 233 NLRB 698 (1977).

Therefore, even in the case of individual rights which are part and parcel of the pursuit of collective advantage, a union's ability to waive statutory rights does not extend to those rights in which the right of the individual bargaining unit member is necessary to the successful operation of the statutory scheme, and especially in cases where the individual's right is exercised in furtherance of an interest that may diverge from the union's interests.

B. Congress Intended That Fundamental Civil Rights And Statutory Minimum Employment Standards Would Not Be Undercut By Collective Bargaining, Including By Adjudication In Collective Bargaining Arbitration.

Here, the collective bargaining agreement seeks to incorporate the statutory commandments of the federal and state discrimination and other employment statutes and submit them for arguably preclusive grievance negotiation, which may or may not end in arbitration, depending solely upon the union's decision whether to submit the statutory claim to arbitration. While the union's agreement to submit discrimination or other statutory claims to the grievance process and potentially to arbitration is enforceable as a contractual matter, the agreement cannot be read to preclude individual unit members from asserting their contractual rights in court. Individual employees are not parties to collective bargaining agreements. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962)

And, as explained above, a collective bargaining representative's powers are limited to collective bargaining purposes, and the statutory rights it may waive are limited to those that arise from federal labor statutes, and then only where those rights exist as tools for collective action. *See also Gardner-Denver*, 415 U.S. at 51-52. There is no authority for the proposition that unions may effectively waive statutory rights of bargaining unit members arising outside of the NLRA (or other labor relations statutes such as the RLA). Nor is there any authority outside of the Fourth Circuit that would allow those statutory minimums to be less directly, but just as surely undercut by submitting them to the grievance and arbitration processes under collective bargaining agreements. Congress and the states' legislatures did not enact federal or state discrimination laws and minimum employment standards as instruments for use in collective bargaining. Those legislative bodies intended that statutory employment standards would not be undercut by collective bargaining, either by direct waiver of the substantive right, or by submitting them to a process of negotiation not in the control of the employee claimant.

Certainly Local 32BJ could waive Respondents' rights to picket to reinforce a demand to bargain concerning age discrimination because picketing is a tool of economic warfare in the control of the certified bargaining representative, but could not waive Respondents' rights to access a judicial forum to adjudicate an ADEA claim. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1975) (union had authority to waive right of bargaining unit members to engage in picketing intended to compel the employer to negotiate with the employees concerning race discrimination). Local 32BJ cannot prohibit pursuit of those discrimination claims independent of the collective bargaining context because its representational status does not encompass those claims. *Cf. Frank Briscoe Inc. v NLRB*, 637 F.2d 946, 950 (3rd Cir. 1981) (concerted activity of filing charges of discrimination with the EEOC in order to end discriminatory employment practices is protected under § 7 because it does not violate the principle of exclusive representation).[15]

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[15] This Court has yet to hold that employers may require employees, as a condition of employment, to agree to arbitrate future statutory claims. However, if an employer can lawfully condition employment on the employee's agreement to waive access to a judicial forum, it may need to bargain with the union concerning imposing that condition, and should it succeed in bargaining, it still would have to get the individual employee's agreement to obtain the waiver. *See* Kelsey-Hayes Co., 2007 WL 4233188 (N.L.R.B.G.C. 2007) Memorandum GC 05-03, at 8-9 (2005); Brief of AFL-CIO and Change to Win; Brief of National Academy of Arbitrators at 26, n. 8. However, this case does not present the Court with that question.

C. Giving Preclusive Effect To a CBA Arbitration Provision Would Undercut This Court's Existing Jurisprudence In Several Areas Where Labor Statutes Intersect With Employment Regulation.

Gardner-Denver's still vital holding that Title VII claims should not be preclusively submitted to the "majoritarian process" of collective bargaining has been followed in several subsequent decisions of this Court concerning other minimum employment standards, all reiterating as a basis for their holdings that those standards are not suitable for sole enforcement through a process not controlled by the employee, but rather embedded in a continuous process of negotiation and compromise controlled by unions. *Barrentine*, 450 U.S. at 734, held that Fair Labor Standard Act ("FLSA") claims could not be precluded by a previous collective bargaining arbitration, precisely because that arbitration process was characterized by the union's ability to compromise statutory standards in furtherance of collective bargaining goals. That type of process did not serve the policies behind the FLSA:

> In contrast to the Labor Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests collectively, the FLSA was designed to give *specific minimum protections to individual workers* and to ensure that each employee covered by the Act would receive " '[a] fair day's pay for a fair day's work' . . ." (emphasis added)

Barrentine, 450 U.S. at 739 (citations omitted). Because of the likelihood that those specific minimum protections would be undermined in the grievance process, the Court noted that "[n]ot all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining," including FLSA claims. *Barrentine*, 450 U.S. at 737.

Similarly, in *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 291 (1984), the Court held that employees may pursue First Amendment claims, brought under 42 U.S.C. § 1983, in a judicial forum and refused to give preclusive effect to a collective bargaining arbitration award. Again a significant basis of the Court's holding was the fact that the individual employee did not control the presentation of the grievance in arbitration:

> [W]hen, as is usually the case, . . . the union has exclusive control over the "manner and extent to which an individual grievance is presented," *Gardner-Denver, supra*, at 58, n. 19, there is an additional reason why arbitration is an inadequate substitute for judicial proceedings. The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee. *See Gardner-Denver, supra*, at 58, n. 19; *Barrentine, supra*, 450 U.S., at 742. Thus, were an arbitration award accorded

> preclusive effect, an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously.

Again, in *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), the fact that an injury was caused by conduct possibly subject to arbitration under the RLA did not deprive a railroad employee of the right to bring an action in court under the Federal Employers' Liability Act. The Court noted that the RLA contained elaborate grievance arbitration (minor dispute) procedures and that the plaintiff's union had taken "preliminary though abortive steps in that direction," concerning the injury. *Buell*, 480 U.S. at 564. However, once again the basis for the Court's holding was "that notwithstanding the strong policies encouraging [labor] arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.' " *Id.* at 565 *quoting Barrentine*, 450 at 737.

This Court's cases concerning § 301 preemption provide further support for holding that protection of minimum statutory employment standards must be insulated from the majoritarian processes inherent in collective bargaining, which places a priority on the collective interests as perceived by the bargaining representative. In *Livadas v. Bradshaw*, 512 U.S. 107, 121-22 (1994), the Court reviewed, in light of *Gilmer*, its previous cases concerning whether a collective bargaining agreement could preempt a state minimum employment standard claim. The Court observed, that "[w]ithin its proper sphere, § 301 has been accorded unusual pre-emptive power." *Id.* at 122, n. 16. However, the Court reiterated that rights under civil rights and minimum employment standard statutes could be brought in court despite similar obligations imposed on the employer in a collective bargaining agreement. The Court

> underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law . . . [and] stressed that it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement, . . . (and not whether a grievance arising from 'precisely the same set of facts' could be pursued) . . . that decides whether a state cause of action may go forward.

Id. at 123 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1967) and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 410 (1988)). *See also, Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (state court cause of action for enforcement of governmentally required minimum working protections is in no way inconsistent with the collective bargaining process under the NLRA); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (same). *Cf., Carmona v. Southwest Airlines*, 2008 WL 2747467 at *4-*6 (5th Cir. July 16, 2008) (RLA minor dispute provisions do not preclude claim under the Americans with Disabilities Act or Title VII sex discrimination claim).

This Court has long held that legislated minimum employment standards "take precedence over conflicting provisions in a collectively bargained" agreement that undercut them. *Barrentine*, 450 U.S. at 740-41 (collecting cases in which this Court held that collective bargaining agreements could not waive FLSA standards). Although the substantive standards and remedies of the ADEA are incorporated by reference in the agreement here, the nature of the process itself just as surely undercut the substance of those ADEA claims as if those standards and remedies were not so incorporated.

D. Inherent Characteristics Of The Collective Bargaining Grievance And Arbitration Process Make That Forum Inadequate To Insure The Enforcement Of Statutory Rights.

The Respondents and the *amicus* National Academy of Arbitrators, as well as other *amici*, have well delineated the unique aspects of collective bargaining arbitration that distinguish it from other arbitral processes that may provide an adequate forum for statutory claims. *Amici* AFL-CIO, Change to Win, and SEIU Local 32BJ readily acknowledge that because a union must take the interests of all members into account, a union's interest in contract enforcement is "not always identical or even compatible" with those of the individual member grievant. *McDonald*, 466 U.S. at 291. Other *amici* have also clearly shown that the duty of fair representation does not require a union to utilize legal representation in grievance arbitration. Moreover, *amici* herein believe it is important to add that even where the union has an attorney, the grievant is not thereby given any more say or control over the process, and has no recourse or remedy if representation does not meet attorney competency standards. Thus, while the rule that the union is the client in grievance arbitrations is consistent with the policies that animate federal labor statutes, it is not consistent with the imperatives of enforcement of civil rights and minimum employment standards legislation.

Grievants in collective bargaining arbitrations are not entitled to the union's attorney's loyalty, competence, or confidentiality. Those duties run to the union only. In matters relating to the collective bargaining process, the union is the client, not the member. *See, e.g.*, *Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 862-63 (10th Cir. 1996); *Peterson v. Kennedy*, 771 F.2d 1244, 1258-59 (9th Cir. 1985), *cert denied*, 475 U.S. 1122 (1986). Any differences between the union and bargaining unit member grievant, even if a union member, are irrelevant to the duty of loyalty and therefore fail to implicate local rules similar to Model Rules of Professional Responsibility ("Model Rules") 1.7 or 1.9. *Adamo v. Hotel Workers' Union*, 655 F. Supp. 1129, 1129-30 (E.D. Mich. 1987) (rejecting attempt to disqualify union attorney in duty of fair representation case, on the ground that the attorney previously handled the employee's grievance); *Griesemer v. Retail Store Employees Union, Local 1393*, 482 F. Supp. 312, 314-15 (E.D. Pa. 1980) (same).

The attorney representing the union in the matter can disclose communications with the grievant to union officers over the objection of the grievant. Model Rule 1.13 & cmt. This is so even if there were an agreement with the grievant creating an attorney-client relationship between them, as that would make the union and the grievant joint clients and neither could assert the privilege against the other. *IBEW Local 323 v. Coral Electric Co.*, 104 F.R.D. 88, 89 (S.D. Fla. 1985). Nor can it be assumed in most situations that attorney communications with the grievant are privileged against disclosure to employers or others. *Compare Upjohn v. United States*, 449 U.S. 383, 394-95 (1981) (holding that corporations may choose to protect as privileged communications from low level employees to the corporation's lawyers) *with Consolidated Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982) (rejecting the *Upjohn* approach and permitting protection only of the communications of the "control group," i.e., those high level employees who control the entity).

In contrast, in most instances the attorney-client privilege may be asserted against even a union member grievant seeking to discover attorney communications with union officers because the union itself is the holder of the privilege which must be protected even against the grievant. Model Rule 1.13 cmt. 2 (2003). *See, e.g.*, *Arcuri v. Trump Taj Mahal Ass'n*, 154 F.R.D. 97 (D.N.J. 1994).

The union, as explained by several *amici*, ordinarily will not allow the grievant to make those decisions about handling the case that typically are the client's decisions. *See e.g.*, *Longshoremen (ILWU) v. Pacific Maritime Ass'n.*, 441 F.2d 1061 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (holding union may unilaterally reject an offer of settlement over grievant's objection); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-339 (1953) (unions may settle even a meritorious grievance, even if the basis of the decision is union finances). Thus, resolution of the claim is completely outside the control of the grievant, who does not have the authority that the attorney's client would have regarding settlement, which may occur against his or her wishes. *See* Model Rule 1.2.

The union's attorney owes no duty of zealous representation to the grievant. *Barrentine*, 450 U.S. at 729 ("[E]ven if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration.") Nor does the attorney owe a duty of competence to the grievant. *See, e.g., Peterson v. Kennedy*, 771 F.2d at 1255 ("[plaintiff's] malpractice claim against the union attorney was 'subsumed' in and precluded by the breach of duty [of fair representation] claim asserted against the union."). Grievants may not bring malpractice suits against the attorney that handled the arbitration because he or she is not grievant's attorney and § 301, as enforced in *Atkinson v. Sinclair*, 370 U.S. 238 (1962), immunizes union agents from damage claims, an immunity that extends to union attorneys. *Peterson*, 771 F.2d at 1255-56. *See also Arnold*, 100 F.3d 857; *Breda v. Scott*, 1 F.3d 908 (9th Cir. 1993) (rule applies whether attorney was inside or outside counsel); *Best v. Rome*, 858 F. Supp. 271 (D. Mass. 1994), *aff'd*, 47 F.3d 1156 (1st Cir. 1995). And, as other *amici* have pointed out, the duty of fair representation provides no recourse for less than competent representation. *See Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554, 557-61 (1976) (holding that union which allegedly failed to investigate and present evidence of political conflict between union leadership and discharged grievants had not breached its duty of fair representation).

For ordinary contractual grievances the limits on a union's liability for actions taken in the course of its representation are well grounded in the collective bargaining mechanism and policy. However, the basis for the lenient standards of the duty of fair representation does not extend to actions taken by employers in violation of civil rights or minimum standards statutes. Yet, the consequence of restricting those claims to the collective bargaining grievance and arbitration process would provide that same shield for employers. This outcome is not called for by federal labor policy. *Huffman*, 345 U.S. at 337 (the duty of fair representation under the NLRA arises from the union's "statutory obligation to represent all members of an appropriate unit"); *Steele*, 323 U.S. at 201 (the duty of fair representation under the RLA arises, not from the collective bargaining agreement, but from the union's status as exclusive bargaining representative.) An arbitration scheme that prevents suits against employers for violation of statutory rights unless the employee can prove the union breached its duty of fair representation in managing the grievance is certainly inconsistent with Congress' intent that those statutes be vigorously enforced. *See* Brief of Amicus National Academy of Arbitrators at pages 27-28.

CONCLUSION

Surely, foreclosing Respondents' ADEA claims simply because their union and employer saw fit to incorporate statutory standards for discrimination grievances into their contract is not consistent with the long lines of labor and employment cases that have maintained the boundary between contractual rights and statutory rights. That boundary between collectively bargained provisions and public law is necessary to the operation of both federal labor policy and federal and state social welfare legislation. the limits on unions' authority to waive unit members' rights arising under statutes, the independent character of legislated standards, and the harm that inadequate adjudication could cause to the substantive rights involved, remain the same. A ruling that the ADEA claims here are foreclosed would cast considerable doubt upon this Court's holdings both before and after *Gardner-Denver* and would send ripples of confusion throughout all the lines of cases that concern the intersection of federal labor statutes with federal and state statutory regulation of employment. The congressional policies inherent in federal labor law and in civil rights and statutory employment regulation remain the same and therefore *stare decisis* considerations require the conclusion that the Court of Appeals be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTES

9 U.S.C. § 1

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

29 U.S.C. § 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title.

29 U.S.C. § 158. Unfair labor practices

It shall be an unfair labor practice for a labor organization or its agents—

****

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

29 U.S.C § 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization

(1) in the district in which such organization maintains its principal office, or

(2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

AMICUS CURIAE BRIEF

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No. 07-581

IN THE

Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Can an arbitration clause in a collective bargaining agreement waive the right of individual bargaining unit workers—including workers who are not union members—to a judicial forum for their statutory discrimination claims?

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

This *amicus curiae* brief for the National Right to Work Legal Defense Foundation, Inc. ("Foundation"), is filed pursuant to Supreme Court Rule 37.3(a) with the written consent of all parties.[1] This brief supports the position of Respondents that the decision of the court of appeals should be affirmed.

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[1] Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, the Foundation affirms that no counsel for any party authored this brief in whole or in part, and that no such counsel or party made a monetary contribution intended to fund the preparation or

INTEREST OF *AMICUS CURIAE*

The Foundation is a charitable legal aid organization formed in 1968 to protect the right to work, freedoms of association, speech and religion, and other fundamental liberties of ordinary men and women from infringement by compulsory unionism arrangements, such as exclusive representation and mandatory union fee requirements.

This Court has decided twelve cases that Foundation attorneys have litigated for workers, including *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998). In *Miller*, the Court ruled that nonmembers of unions who do not personally agree to union-established arbitration procedures cannot be required to use those procedures before challenging in federal court the amount of their compulsory fees for collective bargaining purposes. Foundation attorneys also represent the nonmember state workers in *Locke v. Karass*, 498 F.3d 49 (1st Cir. 2007), *cert. granted*, 128 S. Ct. 1224 (U.S. Feb. 19, 2008) (No. 07-610), in which the Court will hear oral argument on October 6, 2008.

Since its founding in 1968, the Foundation has aided more than 200,000 nonunion employees in vindicating their constitutional and civil rights against unions and employers through the courts under statutes such as 42 U.S.C. § 1983 and Title VII

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submission of this brief. No person other than the *amicus curiae* and its counsel made such a monetary contribution (the Foundation has no members).

of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. Reversal of the court of appeals' decision in this case would enable a union to deny such workers access to the courts for claims against their employers, despite the inevitable conflict, inherent in exclusive representation, between the interests of non-members and their unwanted monopoly bargaining agent.

The Question Presented, as stated by Petitioners ("the Employers"), misleadingly refers only to "union members' right to a judicial forum for their statutory discrimination claims." (Pet'rs' Br. at i.) Moreover, Respondents ("the Employees") "are all members of Local 32BJ," the union in this case. (*Id.* at 8.) Respondents' opposition to the Petition for Certiorari thus understandably did not—and their brief on the merits likely may not—argue that union waiver of a judicial forum for statutory claims is particularly inappropriate for nonmembers subjected to exclusive representation. The Foundation, therefore, files this brief to bring to the Court's attention that "relevant [argument] not already brought to its attention by the parties," Sup. Ct. R. 37.1

SUMMARY OF ARGUMENT

It is "black letter" law that an individual cannot be required to submit to arbitration any dispute that he or she has not voluntary agreed so to submit.

The only exception to this fundamental rule is that an exclusive bargaining agent may agree in a collective bargaining agreement that bargaining unit employees must arbitrate contractual grievances arising from that agreement. This Court correctly held in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36

(1974), *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), that this exception does not extend to waiver of a judicial forum for individual workers' statutory discrimination claims, because the interests of a government-imposed monopoly bargaining agent do not necessarily coincide with, and often are adverse to, the interests of individual workers and minority groups of workers. That disparity of interests is particularly acute in the case of nonmembers, members who did not choose that agent, and workers who have been coerced or tricked into membership.

Moreover, that a labor contract containing an arbitration provision might possibly be submitted to a vote of the union membership does not satisfy the principle that individuals must voluntarily agree to submit their claims to arbitration. Such a vote is not required by law. Even when a proposed contract is submitted to the union membership for a ratification vote, not all members vote, some members vote "no," nonmembers almost always are denied a vote, and union officials have no obligation to disclose before the vote that the agreement contains a binding arbitration provision for statutory claims.

ARGUMENT

I. A Government-Imposed Monopoly Bargaining Agent's Waiver of a Judicial Forum for Individual Statutory Claims Is Inconsistent with the Voluntary Nature of Arbitration.

It is a fundamental legal principle that "a party cannot be required to submit to arbitration any dispute which ***he*** has not agreed so to submit."

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (emphasis added); *accord, e.g.*, *Miller*, 523 U.S. at 867; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974). An individual's agreement to arbitrate can be in a commercial contract to which he is party, *e.g.*, a securities registration application, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991), or in the union-member contract to which one agrees by joining a union, *see Neal v. System Bd. of Adjustment*, 348 F.2d 722, 726 (8th Cir. 1965).[2]

But, the *sine qua non* of such an agreement is that it be voluntary: "presumably an employee may waive his cause of action under [a civil rights statute] as part of a ***voluntary***" agreement. *Gardner-Denver*, 415 U.S. at 52 (emphasis added); *see also Gilmer*, 500 U.S. at 33 ("[t]here is no indication in this case . . . that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause . . . .").

The only recognized exception to the principle that a party must personally and voluntarily agree to submit to arbitration is that an exclusive bargaining representative may agree in a collective-bargaining agreement that represented employees must arbitrate ***contractual*** grievances under that agreement.

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[2] However, requirements that union members exhaust internal union remedies are limited both by statute and this Court's decisions. *See* 29 U.S.C. § 411(a)(4) (1988); *Clayton v. Auto Workers*, 451 U.S. 679 (1981).

See Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965). The Employers would here extend that narrow exception to employees' statutory discrimination claims.

However, a union is exclusive representative only "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). It is not exclusive representative for all employment-related purposes, including enforcement of statutes protecting workers from discrimination in employment. *See National Treasury Employees Union v. FLRA*, 800 F.2d 1165 (D.C. Cir. 1986) (opinion by Bork, J.) (union is exclusive representative and has duty of fair representation only for "a grievance or other procedure growing out of a collective bargaining agreement," and not for "a statutory procedure to challenge a removal action").

Thus, as this Court held in *Gardner-Denver*:

> a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. ***Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. . . . Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the***

> ***paramount congressional purpose behind Title VII.***

415 U.S. at 51 (emphasis added) (citations omitted); *see McDonald v. City of West Branch*, 466 U.S. 284, 292 n.12 (1984) (arbitration clause of collective agreement cannot preclude judicial action under 42 U.S.C. § 1983 because that "would gravely undermine the effectiveness of § 1983").[3]

The Employers argue that *Gardner-Denver* merely stated dicta when it said that Title VII rights "can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII," 415 U.S. at 51. (Pet'rs' Br. at 38.) To the contrary, that was a necessary holding of the Court, because had the union in that case been able to waive the employee's Title VII cause of action in the bargaining agreement, the employee would have been bound to the result of the arbitration.

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[3] The Employers over-broadly contend that *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), "held that unions may waive individual statutory rights of their members," (Pet'rs' Br. at 23). That case only holds that a union may waive certain ***economic*** rights protected by the National Labor Relations Act ("NLRA"): "a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative." *Id.* at 705-06; *see also id.* at 706 n.11 (distinguishing *Gardner-Denver* on the basis that the latter case found union waiver of the right at issue to be inconsistent with a statute other than the NLRA). The rights waived in *Metropolitan Edison* were not even the rights of members, but the rights of union ***officials*** that are "closely related to the economic decision a union makes when it waives its members' right to strike." *Id.* at 706.

In *Wright v. Universal Maritime Service Corp.*, the Court would later find no waiver because an agreement did not clearly require arbitration of statutory claims. 525 U.S. 70, 81-82 (1998). Although the agreement in *Gardner-Denver* also did not clearly require arbitration of statutory claims, *see* 415 U.S. at 39-42, the Court did not decide that case on that basis. Rather, unlike the Court in *Wright*, the *Gardner-Denver* Court unanimously held that the "statutory cause of action was not waived by the union's agreement to the arbitration provision of the CBA, since 'there can be no prospective waiver of an employee's rights under Title VII.'" *Wright*, 525 U.S. at 76 (quoting 415 U.S. at 51 as "the ***holding*** of *Gardner-Denver*") (emphasis added).[4]

Gilmer did not repudiate that holding. Rather, "*Gilmer* emphasized its basic consistency with [the Court's] unanimous decision in [*Gardner-Denver*]. *Livadas v. Bradshaw*, 512 U.S. 107, 126 n.21 (1994).

Indeed, "that federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts" is "a distinction that assuredly finds ***support*** in the text of *Gilmer*." *Wright*, 525 U.S. at 77 (emphasis added). This distinction exists because, "in the context of a collective-bargaining agreement," an "important concern" is "the tension between collective representation and individual statutory rights, a concern not applicable to" individual contracts. *Gilmer*, 500 U.S. at 35.

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[4] *See also Wright*, 525 U.S. at 80 ("*Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights").

The source of that tension is, as *Gilmer* recognized, "the potential disparity in interests between a union and an employee," *id.*, that always inheres in the monopolistic system of exclusive representation the federal labor statutes impose on workers.

Under exclusive representation, the bargaining agent chosen at one point in time by a majority of the employees in a bargaining unit, either through an election or signing union authorization cards, represents not only its voluntary members, but "***all*** the employees in such unit." 29 U.S.C. § 159(a) (emphasis added); *see* 45 U.S.C. § 152, Fourth.

That means that the bargaining agent represents not just voluntary union members, but also: unit workers who voted against union representation or refused to sign union cards; workers who have refused to join or resigned from membership (nonmembers);[5] workers who were not even in the unit when the union was chosen and thus had no say in choosing their bargaining representative; workers who otherwise would not, but have joined the union because that is the only way that they can have any say over the determination of their terms and conditions of employment,[6] and workers who have joined the union because they were misled by an agreement that on its face requires "membership" or

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[5] *See, e.g.*, *Communications Workers v. Beck*, 487 U.S. 735, 739 (1988).

[6] *See, e.g.*, *Kidwell v. Transportation Commc'ns Int'l*, 946 F.2d 283, 294-97 (4th Cir. 1991) (employees must join union to be able to vote for negotiating team and on contract ratification).

"membership in good standing" as a condition of employment.[7]

Consequently, in "arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Gardner-Denver*, 415 U.S. at 58 n.19. Indeed, the interests of a minority group of employees may be subordinated to the interests of the majority. *See, e.g., Emporium Capwell Co. v. Western Addition Comty. Org.*, 420 U.S. 50, 62 (1975).

"Moreover, harmony of interest between the union and the individual employee cannot always be presumed . . . ." *Gardner-Denver*, 415 U.S. at 58 n.19. "The union's interests and those of the individual employee are not always identical or even compatible." *McDonald*, 466 U.S. at 289. That is particularly true where nonmembers are concerned. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

The Employers argue that the "duty of fair representation protects the employees." (Pet'rs' Br. at 42.) However, *Gardner-Denver* and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), explicitly rejected that argument. A "breach of the union's duty of fair representation may prove difficult to establish." *Gardner-Denver*, 415 U.S. at 58 n.19. Moreover, "even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbition," or not support the claim at all. *Barrentine*, 450 U.S. at 742.[8]

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[7] *See, e.g., Marquez v. Screen Actors Guild*, 525 U.S. 33, 52-53 (1998) (Kennedy & Thomas, JJ., concurring).

In sum, because the interests of individual employees do not necessarily coincide with the interests of their government-imposed monopoly bargaining agent, and may well be adverse, this Court should follow *Gardner-Denver, Barrentine,* and *McDonald* and hold that a union may not waive the right of employees it represents to pursue a judicial forum for vindication of their statutory civil rights.

II. It Cannot Be Assumed That Individual Employees Have Voluntarily Ratified a Collective Bargaining Agreement Provision Waiving a Judicial Forum for Their Statutory Claims.

The Employers repeatedly assert that the applicable collective bargaining agreement was "voted upon and ratified by the union membership." (*E.g.*, Pet'rs' Br. at 3-4.) If true, that, however, is insufficient to provide the voluntary individual assent to binding participation that is the touchstone of arbitration, *see supra* pp. 4-5, either in this case or generally.

The record here does not reflect whether the Employees voted on ratification of the applicable collective bargaining agreement, or how they voted if they did. The Employers do not even cite record evidence that the contract was submitted to a vote of the union membership. Moreover, even if the Employees did vote on the contract, that does not mean that they voted for ratification. Not voting on, or voting against, ratification of a contract that purports to require arbitration of statutory claims cannot possibly be construed as a voluntary individual agreement to arbitrate.

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[8] The Brief *Amicus Curiae* of the National Academy of Arbitrators ("NAA") in Support of Respondents throughly and persuasively shows that this Court correctly concluded in *Gardner-Denver* and *Barrentine* that the vindication of an individual's, or a minority's, statutory civil rights should not depend upon the exercise of a majority union's duty of fair representation. (NAA Br. at 16-23.) Mindful of Supreme Court Rule 37.1's admonition against repetition, we endorse the NAA's argument on this point.

More important, nonmember employees in a bargaining unit are almost never permitted to vote on ratification of the contract that determines their terms and conditions of employment. Nonmembers have absolutely no right to do so, because contract ratification is an "internal union matter." *E.g.*, *Kidwell v. Transportation Commc'ns Int'l*, 946 F.2d 283, 294-97 (4th Cir. 1991) (under Railway Labor Act, citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958)); *Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1318-19 (5th Cir. 1988) (citing *NLRB v. Financial Inst. Employees*, 475 U.S. 192, 205 (1986)).

Indeed, there is no guarantee that even union members can vote on ratification of a collective bargaining agreement.

Employees who are hired and join a union after its contract has been ratified obviously have no "opportunity to consent (or not) to a promise to arbitrate statutory discrimination claims," (Pet'rs' Br. at 45). Moreover, union members have no statutory right to vote on ratification of collective bargaining agreements, and contracts are often ratified solely by union officials. Under the NLRA, "a vote of the membership [i]s not necessary to the formation of a collective-bargaining agreement," because

> [a] union is not obligated to obtain ratification of any collective-bargaining agreement that it negotiates on behalf of employees it represents. Rather, as the designated representative, the union is free to negotiate and make binding agreements, with or without the formal consent or ratification of the unit employees.

International Longshoreman's Ass'n, Local 1575, 332 N.L.R.B. 1336, 1336 (2000) (citation omitted) (citing several cases).

The Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(1), also "does not require that union members be given the opportunity to ratify collective bargaining agreements negotiated by their bargaining representatives." *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463, 1476 (9th Cir. 1992); *accord, e.g.*, *Cleveland Orchestra Comm. v. Cleveland Fed'n of Musicians*, 303 F.2d 229, 232-34 (6th Cir. 1962). Nor, if a union allows a ratification vote, does the LMRDA "require union leaders to make a full disclosure of all of the terms and provisions of a collective bargaining agreement prior to submitting the agreement to the union membership for ratification." *Ackley*, 958 F.2d at 1466.

Thus, almost always, nonmembers cannot be said to have voluntarily ratified a collective bargaining agreement relegating them to binding arbitration of their statutory claims. In many cases, that is also true of union members, because they were not in the unit when the contract was ratified, or because union officials did not submit the proposed contract to a membership vote or, in allowing a vote, did not disclose to members the provision requiring arbitration.

CONCLUSION

The Second Circuit correctly held that *Gilmer* and *Wright* are consistent with *Gardner-Denver*, *Barrentine*, and *McDonald*. The judgment below should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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No. 07-581

IN THE
Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Service Employees International Union, Local 32BJ files this brief *amicus curiae* in support of respondents with the consent of the parties as provided for in the Rules of this Court.[1] Local 32BJ is the union-party to the collective bargaining agreement at issue in this case. Local 32BJ represents some 90,000 workers, primarily in the property service industry, in the Mid-Atlantic region stretching from Northern Virginia to Connecticut. The Union's New York City membership includes some 50,000 workers covered by three separate multiemployer collective bargaining agreements with the Realty Advisory Board on Labor Relations, Inc., including the Contractors Agreement at issue here.

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The petitioners 14 Penn Plaza LLC and Temco Service Industries, Inc. contend that the respondents Steven Pyett, Thomas O'Connell, and Michael Phillips are bound to arbitrate their Age Discrimination in Employment Act claims in this case by the Contractors Agreement between Service Employees International Union, Local 32BJ and the Realty Advisory Board on Labor Relations, Inc., a multiemployer collective bargaining agreement covering Pyett *et al.* and their employer, Temco. This brief, submitted on behalf of the union-party to that agreement, demonstrates that the agreement does *not* bind Pyett, *et al.* to arbitrate the ADEA claims brought in this case.

The Contractors Agreement provides that employment discrimination claims, including statutory claims, are "subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations." Pet. App. 48a. However, the "grievance and arbitration procedure [in] Articles V and VI" of the Contractors Agreement provides only for arbitration of "differences arising between the parties," i.e., between the Union and a covered employer, and that employee grievances may be brought to arbitration only as "Union claims [which] are brought by the Union alone." Pet. App. 43a, 46a.

There are no "differences . . . between the parties" with respect to the ADEA claims in this case. Both the Union and the employer have concluded that those claims are lacking in merit. Based on its view of the merits, the Union refused to bring the ADEA claims to arbitration. That being so, "arbitration [of the ADEA claims] . . . in the manner provided for in [the] agreement," 9 U.S.C. § 4, is not available here and the courts below correctly denied the Federal Arbitration Act petition to order arbitration.

ARGUMENT

This case comes to the Court on an interlocutory appeal under § 16(a) of the Federal Arbitration Act from "an order . . . denying a petition under section 4 of th[e] Act to order arbitration to proceed." 9 U.S.C. § 16a.[2] The order in question denied an FAA § 4 petition by 14 Penn Plaza LLC and Temco Service Industries, Inc. ("Defendants") to order Steven Pyett, Thomas O'Connell, and Michael Phillips ("Plaintiffs") to arbitrate their Age Discrimination in Employment Act claims against the Defendants. The Plaintiffs are building service workers employed by Temco who worked at the 14 Penn Plaza office building in midtown Manhattan in a bargaining unit represented by the Service Employees International Union, Local 32BJ and who filed an ADEA lawsuit against the Defendants.

Section 4 of the Federal Arbitration Act provides for the enforcement of "a written agreement for arbitration" by "an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The "written agreement for arbitration" invoked by the Defendants in moving to compel arbitration is the no-discrimination clause contained in the multiemployer collective bargaining agreement covering Temco negotiated by Local 32BJ and the Realty Advisory Board on Labor Relations, Inc. *See* Pet. Br. 10, 40.

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[2] The court of appeals below proceeded on the assumption that it had jurisdiction over the interlocutory appeal under the FAA. *See* Pet. App. 5a, 7a. While the question was not raised below, we would note that it is not settled that the FAA applies to collective bargaining agreements covered by the Labor Management Relations Act. *See International Ass'n of Machinists v. Goodrich*, 410 F.3d 204, 207 n. 2 (5th Cir. 2005).

As we show herein, the multiemployer collective bargaining agreement covering Temco does not constitute a "written agreement for arbitration" of the Plaintiffs' ADEA claims against the Defendants. That being so, the courts below correctly denied the Defendants' petition for an order directing that the Plaintiffs proceed to an arbitration of their ADEA claims.

We begin by carefully reviewing the terms of the Local 32BJ/Realty Advisory Board collective bargaining agreement and the nature of the agreement's grievance-arbitration procedure. We then describe the particular employment dispute that gave rise to this case and the Union's handling of the grievance arising out of that dispute. Finally, we show that the collective bargaining agreement does not provide for arbitration of the Plaintiffs' ADEA claims here.

I. THE COLLECTIVE BARGAINING AGREEMENT

The collective bargaining agreement at issue in this case is the 2002 "Contractors Agreement" between Local 32BJ and the Realty Advisory Board on Labor Relations, Inc.[3] The Realty Advisory Board negotiated that agreement on behalf of its member cleaning contractor employers in the building services industry, which included Temco Service Industries, the direct employer of the Plaintiffs. Pet. App. 15a. The Contractors Agreement is one of several multi-employer collective bargaining agreements between Local 32BJ and the Realty Advisory Board covering different sectors of the building services industry in the New York City area.

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[3] The 2002 Contractors Agreement was in effect from January 1, 2002 to September 30, 2004 and covers the period during which the events giving rise to the claims in this case occurred.

The 2002 Contractors Agreement was the first Local 32BJ/Realty Advisory Board collective bargaining agreement specifically covering the cleaning contractor segment of the New York City building services industry. Following the general pattern of the other Local 32BJ/Realty Advisory Board agreements, the Contractors Agreement sets the rates of pay, seniority, the amount and conditions of employment leave, the manner of filling vacancies, and myriad other basic terms and conditions of employment. Of particular concern here are the Contractors Agreement's grievance and arbitration procedures and its nodiscrimination provision.

A. Article V. Grievance Procedure

Article V of the Contractors Agreement creates a grievance procedure through which Local 32BJ and the covered employers "endeavor to adjust" *both* "issues not covered by and not inconsistent with any provision of th[e] Agreement[,] which the parties are not required to arbitrate" *and* "any issue between the parties which under th[e] Agreement the parties are

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The Joint Appendix (JA 47-48) and Petition Appendix (Pet. App. 43a-48a) contain excerpts from the 2005 collective bargaining agreement that went into effect in October 2004 after the events that give rise to this case. The relevant terms of the 2002 and 2005 agreements are identical.

obligated to submit to the Arbitrator."[4] With certain exceptions not pertinent here, grievances must be filed within one hundred and twenty days of the subject occurrence.

There are two steps to the grievance procedure. The first step is a meeting between ground-level representatives of the covered employer and of Local 32BJ. The second step is a meeting between higher-level employer and Union representatives, which may include the parties' respective attorneys. Formal mediation may occur at the second step, especially where arbitrable grievances are concerned, with the Realty Advisory Board and Local 32BJ sharing the costs equally. Local 32BJ controls the presentation of grievances, on its side, at each step and determines which of those grievances will advance through the steps of the grievance procedure. Affected employee-grievants may or may not attend the grievances meetings depending on whether Local 32BJ decides their presence is warranted.

Grievances concerning interpretation or application of the terms of the collective bargaining agreement that have not been resolved may be taken to arbitration at the request of either Local 32BJ or the affected employer. While Local 32BJ has the right to request arbitration of grievances on its side, the individual employee-grievants have no such right.

B. Article VI. Arbitration

Article VI provides for "a Contract Arbitrator to decide all differences arising between the parties as to interpretation, application or performance of any part of th[e] Agreement and such other issues as the parties are expressly required to arbitrate before him under the terms of this Agreement." Pet. App. 43a.[5] The arbitration procedure is invoked by "either party . . . serv[ing] written notice upon the other that the grievance procedure has not resulted in an adjustment." Pet. App. 44a.

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[4] Articles V of the agreement setting forth the contractual grievance procedure is reproduced in Appendix A to this brief.

The arbitration clause makes clear that "[a]ll Union claims are brought by the Union alone" and that "no individual [may] compromise or settle any claim without the written permission of the Union." Pet. App. 46a. The Union, however, may compromise or settle any claim, including by withdrawing a grievance from arbitration, without the permission of the affected employee-grievant.

When Local 32BJ takes a grievance to arbitration, the Union controls the presentation of the grievance and of the supporting evidence at the hearing. The arbitrator is required to "conduct the hearing" even if "the Union appears at [the] arbitration without the grievant." Pet. App. 46a. If the grievant is present, he may not participate in the hearing without the Union's permission. On occasion, as in this case, the Union allows the grievant to be accompanied by his personal lawyer. The grievant's lawyer may not, however, play an independent role at the hearing without the Union's permission.

By the terms of Article VI, "[t]he procedure herein outlined in respect to matters over which the Contract Arbitrator has jurisdiction [is] the sole and exclusive method for the determination of all such issues." Pet. App. 45a. The Contract Arbitrator is required to issue his award within thirty days of the close of the hearing and has "the power to grant any remedy required to correct a violation of th[e] agreement." Pet. App. 45a. "[T]he award of the Arbitrator" on matters submitted for decision is "final and binding upon the parties and the employee(s) involved." *Ibid.*

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[5] Article VI is reproduced at Pet. App. 43a-47a.

The Contract Arbitrator is drawn from a panel of twelve named arbitrators administered by an entity called the "Office of the Contract Arbitrator-Building Service Industry." Pet. App. 47a. The Office of the Contract Arbitrator is a partnership between Local 32BJ and the Realty Advisory Board. The Office of the Contract Arbitrator assigns arbitrators under a number of the collective bargaining agreements between Local 32BJ and the Realty Advisory Board, not just under the Contractors Agreement at issue here. In recent years, on average the Office of the Contract Arbitrator has assigned over 700 cases for arbitration each year, over half of these cases settled at some point prior to a final decision by the arbitrator.

The Office of the Contract Arbitrator has its own offices and administrative staff. The costs of maintaining the Office of the Contract Arbitrator are shared equally by Local 32BJ and the Realty Advisory Board. Pet. App. 47a. In addition to sharing the costs of maintaining the Office, the Union and the Board share equally the cost of each arbitration proceeding arising under their agreements. Pet. App. 44a. The Office of the Contract Arbitrator is available to assign arbitrators for arbitrations involving employers that are not members of the Realty Advisory Board and are not covered by any of the Board's collective bargaining agreements with Local 32BJ; those nonmember employers are charged a per-arbitration fee to cover the nonmember employer's share of the arbitration costs.

The twelve arbitrators on the Office of the Contract Arbitrator panel are chosen by mutual agreement between Local 32BJ and the Realty Advisory Board. Either Local 32BJ or the Board may strike an arbitrator from the panel at any time for any reason, in which case a successor to the struck panel member may be selected by mutual agreement. Pet. App. 47a.

C. Article XIV. Section 30. No Discrimination

Section 30 of Article XIV provides that "[t]here shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law." Pet. App. 48a.[6] Section 30 adds that discrimination claims, "including . . . claims made pursuant to . . . the Age Discrimination in Employment Act, . . . or any other similar laws . . . shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations." *Ibid.* And, Section 30 concludes by directing that "[a]rbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination." *Ibid.*

The no-discrimination clause in the Contractors Agreement is identical in all material respects to the no-discrimination clauses in the other Local 32BJ/Realty Advisory Board collective bargaining agreements.[7] And, as the Defendants correctly observe, the bargaining history behind the present formulation of that clause is pertinent. *See* Pet. Br. 6.

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[6] Article XIV, Section 30 is reproduced at Pet. App. 48a.

[7] Some of the no-discrimination clauses do not contain the reference to New Jersey and Connecticut law that appear in the Contractors Agreement. All of the clauses contain the same reference to New York law.

The various collective bargaining agreements between Local 32BJ and the Realty Advisory Board have long contained no-discrimination clauses. Typical of the earlier versions of this clause were the no-discrimination clauses in the 1994 Apartment Building Agreement and the 1996 Commercial Building Agreement, which provided simply:

> "There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability of an individual in accordance with applicable law, national origin, sex or union membership."

The first reference to arbitration of discrimination claims, including claims of discrimination in violation of law, appeared in the 1997 Apartment Building Agreement, which contained the new language indicated by italics here:

> "There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability of an individual in accordance with applicable law, national origin, sex or union membership, *or any characteristic protected by law. Any disputes under this provision shall be subject to the grievance and arbitration procedure (Articles V and VI).*" (emphasis added)

The no-discrimination clause was further amended in the 1999 Commercial Building Agreement, with the new language added in that round of negotiations indicated by italics here.

> "There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin,

> sex, union membership, or any characteristic protected by law, *including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, or any other similar laws, rules or regulations. All such claims* shall be subject to the grievance and arbitration procedure (Articles VII and VIII) *as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.*" (emphasis added)

During negotiations for the 2000 Apartment Building Agreement, the Realty Advisory Board made the following proposal:

"No Discrimination:

> "(a) Amend Article XVII, Section 23 [the no-discrimination clause] to conform to the language of the 1999 Commercial Agreement.
>
> "(b) Add fourth paragraph to Article IV [the management rights clause] indicating that nothing in this Agreement shall be construed to prevent the Employer from requiring, as a condition of employment, that employees are required to submit all claims of discrimination in employment to the Arbitration process under this Agreement."

Local 32BJ agreed to paragraph (a) of the Realty Advisory Board proposal, while expressly conditioning its agreement on the understanding that the "modifications [to the language of the no-discrimination clause] were not intended to alter or change the parties' understanding set forth in the

1997 Apartment Building Agreement" and on the parties' "joint commitment to diversify the panel of arbitrators to better reflect the Union's membership, to develop procedures appropriate for such cases, and to evaluate our experience in connection with these claims."[8]

But Local 32BJ refused to agree to paragraph (b) of the Board's proposal – allowing the employers to "requir[e], as a condition of employment, that employees are required to submit all claims of discrimination in employment to the Arbitration process under this Agreement" – and the Board withdrew that part of its proposal.[9]

In 2002, when Local 32BJ and the Realty Advisory Board negotiated the first Contractors Agreement covering the Board's cleaning contractor members, the parties followed the pattern set by the previous

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[8] The contemporaneous side-letter stating the Union's conditions for agreeing to the change is reproduced as Appendix B to this brief.

[9] The Realty Advisory Board did succeed in getting such a requirement in its 2001 agreement with Operating Engineers Local 94 covering the stationary engineers in the New York City commercial buildings. The no-discrimination clause in the 2001 Operating Engineers agreement, with the pertinent language italicized, read as follows:

> "All claims alleging illegal discrimination under any of the above authorities shall be subject to the Agreement's grievance and Arbitration procedure as the final, binding, sole and exclusive remedy for such violations, *and employees covered by this Agreement shall not file suit or seek relief in any other forum*. This provision shall apply to allegations arising out of events occurring before and/or after the effective date of this Agreement. Arbitrators shall apply applicable law as it would be applied by the appropriate court in rendering decisions on discrimination claims." (emphasis added)

Commercial Building and Apartment Building agreements and the Contractors Agreement's no-discrimination clause was identical in all material respects to the no-discrimination clauses in those agreements.

As the bargaining history suggests and as the Defendants note, the standard no-discrimination clause in the Local 32BJ/Realty Advisory Board collective bargaining agreements was amended in 1999 to take account of this Court's decision in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). Pet. Br. 6. The point of those amendments was to provide that the Contract Arbitrator would have full authority to decide any statutory discrimination claim that the Union may present to him for decision and to issue an adequate remedy for any statutory violation found. Vesting the Contract Arbitrators with this authority allows Local 32BJ to seek full relief for any discrimination claims the Union may bring to arbitration. And, by virtue of the provision in the arbitration clause making "the award of the Arbitrator . . . final and binding upon the parties and the employee(s) involved," Pet. App. 45a, the employer is ensured, to the extent allowed by law, that any statutory discrimination claim decided by a Contractor Arbitrator cannot be relitigated by Local 32BJ or by the employee-grievant in court.

Of particular significance to the instant case, the amendments to the no-discrimination clause did *not* make any changes to the grievance-arbitration procedure itself. To the contrary, the amended no-discrimination provision states that it is precisely the "grievance and arbitration procedure [in] Articles V and VI" that would provide the means for addressing discrimination claims. Pet. App. 48a. As we have shown, the contractual grievance-arbitration procedure provides that only Local 32BJ, and not the affected employee-grievant, has the right to bring a statutory discrimination claim to arbitration and that "[a]ll Union claims are brought by the Union alone." Pet. App. 46a. Thus, the amended no-discrimination clause does not constitute a written agreement allowing employees to arbitrate statutory discrimination, much less an agreement requiring employees to arbitrate such claims where the Union has declined to arbitrate them. Moreover, under the amended no-discrimination clause, as before, the arbitration clause provides that it is only "the award of the Arbitrator" that is "final and binding on . . . the employee(s) involved," Pet. App. 45a, and not a decision of the Union to decline to arbitrate a discrimination claim.

As the Realty Advisory Board recognized in its 2000 Apartment Building Agreement proposal, to legally bind the Union-represented employees to arbitrate all statutory discrimination claims, including those that are not brought to arbitration by the Union through the grievance-arbitration procedure, would be to require those employees to directly enter into bilateral arbitration agreements with their respective employers of the type addressed by this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). It was for this reason that the Board proposed to allow the covered employers to condition employment on employees entering directly into such bilateral agreements with their employers. As we have noted, the Union declined to agree to that proposal, and the Realty Advisory Board has not raised the matter again.

II. THE EMPLOYMENT DISPUTE UNDERLYING THIS CASE

The instant ADEA case arises out of the decision by 14 Penn Plaza LLC, the owner and manager of the building in which the Plaintiffs worked, to engage a firm specializing in building security to provide the security services that had previously been provided by Temco, the Plaintiffs' direct employer. Pet. App. 4a. In August 2003, Penn Plaza contracted with Spartan Security to perform the security functions. *Ibid.* As a direct result, Temco reassigned the Plaintiffs from their jobs as night watchmen at the 14 Penn Plaza building to other jobs with less opportunity for overtime pay. *Id.* at 4a, 16a.

Temco and 14 Penn Plaza LLC secured in advance the consent of Local 32BJ to contracting with Spartan Security to perform the security work. Pet. App. 4a. Local 32BJ agreed to Penn Plaza bringing in Spartan only after receiving assurances that the security work would be performed by a firm having wage rates in conformity with local industry standards.

The Plaintiffs requested Local 32BJ to file a grievance under the Contractors Agreement making three claims: first, that their reassignments constituted age discrimination on the ground that the Spartan employees assigned to serve as night watchmen at the 14 Penn Plaza building were younger; second, that Temco had failed to allocate overtime equitably; and third, that Temco had violated seniority in filling a vacancy. Pet. App. 4a, 16a-17a; JA 83, 89, 95-96.

Local 32BJ processed the grievance through the two steps of the grievance procedure. JA 51. Having exhausted the grievance procedure, the Union requested arbitration of all three claims made in the grievance. Pet. App. 4a, 17a; JA 50-51. The Office of the Contract Arbitrator assigned Earl R. Pfeffer to be the Contract Arbitrator. JA 66. The hearing before Arbitrator Pfeffer on the grievance opened on February 2, 2004. JA 50.

Shortly after the arbitration hearings opened, the attorney representing Local 32BJ in the arbitration informed the Plaintiffs that the Union had decided to withdraw the age discrimination claim from arbitration. JA 83-84, 90, 96-97. Local 32BJ's attorney explained that the Union had consented to Spartan Security being brought in by 14 Penn Plaza LLC to provide the security services previously provided by Temco and that, in the Union's view, Spartan's actions in assigning the work to its own employees did not constitute age discrimination by Temco. *Ibid.* Thereafter, on February 23, 2004, Local 32BJ sent a letter to Arbitrator Pfeffer formally withdrawing the age discrimination claim from arbitration. JA 99.

Local 32BJ requested that the arbitrator decide the remaining two claims presented by the grievance. JA 99. Between March 2004 and March 2005, a number of hearings were held on those claims. JA 50 & n.1. On August 10, 2005, Arbitrator Pfeffer issued an award denying the grievance. JA 65.

In May 2004, the Plaintiffs filed charges with the Equal Employment Opportunity Commission alleging ADEA violations by Temco and 14 Penn Plaza LLC. Pet. App. 17a. In August 2004, the Plaintiffs filed suit against Local 32BJ claiming that the Union had breached its duty of fair representation by withdrawing the age discrimination claim from arbitration but withdrew that fair representation suit following the arbitrator's decision. *Id.* at 17a-18a. In June and September 2004, the EEOC dismissed the

Plaintiffs' age discrimination claims and issued right-to-sue letters. *Id.* at 5a. The Plaintiffs filed the instant age discrimination suit in September 2004. *Ibid.*

In response to the Plaintiffs' age discrimination lawsuit, the Defendants made a request that the Plaintiffs arbitrate their age discrimination claim before Arbitrator Pfeffer. JA 46. At the Defendants' request, Local 32BJ stipulated that, if the Plaintiffs and the Defendants came to an agreement to arbitrate the age discrimination claims, those parties could use the Office of the Contract Arbitrator as a forum for the arbitration, but only if those parties bore the expense themselves. Pet. App. 42a. The Plaintiffs – who felt that the Office of the Contract Arbitrator could not fairly decide their age discrimination claims, because the Defendants and the Union, which maintain the Office, had agreed to bring in Spartan to provide security at the 14 Penn Plaza building, JA 85, 91-92, 98 – declined the Defendants' request.

On November 23, 2005, the Defendants moved to compel the Plaintiffs to arbitrate their age discrimination claims. JA 40. The courts below denied that motion to compel arbitration. Pet. App. 5a-6a.

III. THE CONTRACTORS AGREEMENT DOES NOT PROVIDE FOR ARBITRATION OF THE ADEA CLAIM IN THIS CASE

Section 4 of the Federal Arbitration Act provides that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" may petition for "an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. §

4. The "written agreement for arbitration" relied upon by the Defendants in moving to compel arbitration here is the sentence in the no-discrimination clause of the Contractors Agreement that states, "All . . . claims [of discrimination under this clause, including claims brought pursuant to an antidiscrimination statute,] shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations." Pet. App. 48a. *See* Pet. Br. 10, 40. The Defendants' reliance on the Contractors Agreement in that regard is misplaced.

The "grievance and arbitration procedure [in] Articles V and VI" of the Contractors Agreement does *not* provide for the arbitration of discrimination claims brought directly *by covered employees* against a covered employer. Rather, that grievance-arbitration procedure only provides for the arbitration of discrimination claims as "Union claims" that may be "brought by the Union alone." Pet. App. 46a. And, the Union has refused to take the Plaintiffs' discrimination claim to arbitration.

Given the Union's control over employee discrimination claims in the "grievance and arbitration procedure [in] Article V and VI" of the Contractors Agreement, Pet. App. 48a, the Plaintiffs had no contractual right or ability "to arbitrate [their ADEA claims] under [that] written agreement for arbitration," 9 U.S.C. § 4. What is more, "an order directing that . . . arbitration proceed," where the Union has not requested such arbitration, would *not* be an order directing that "arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. For "arbitration [to] proceed in the manner provided for in [that] agreement," 9 U.S.C. § 4, the Union must request arbitration of the discrimination claims as a

"*Union claim*[]." Pet. App. 46a. Since the Union has not requested arbitration, the Contractors Agreement does not provide a basis for ordering arbitration of the Plaintiffs' ADEA claims.

Arbitration of the Plaintiffs' age discrimination claims through the procedures provided in the Contractors Agreement has not been requested for the simple reason that there is no dispute between Local 32BJ and the Defendants over those claims. The Union and the Defendants both believe that the Plaintiffs' claims lack merit. That being so, there are *no* "differences arising between the parties" as to the age discrimination claims for "a Contract Arbitrator to decide." Pet. App. 43a. "[T]he grievance and arbitration procedure [in] Articles V and VI" of the Contractors Agreement most certainly does not provide for arbitration of discrimination claims that the Union has specifically declined to present for arbitration on the grounds that the Union believes the claims lack merit.

This understanding of the grievance-arbitration procedure is reinforced by the nature of the panel of Contract Arbitrators provided in the agreement. The arbitrators on this panel are chosen by Local 32BJ and the Realty Advisory Board and can be removed from the panel by either the Union or the Board for any reason. Pet. App. 47a. That being so, as the Plaintiffs observed in declining to arbitrate, JA 85, 91-92, 98, a Contract Arbitrator drawn from the Office of the Contractor Arbitrator panel might not be entirely impartial in ruling on an employee grievance that both the Union and the employer have concluded lacks merit.

The Union's permission for the Plaintiffs and the Defendants to use the Office of the Contract Arbitrator did not constitute a request for arbitration pursuant to Article VI of the agreement. To the contrary, the Union made clear in granting permission that any such arbitration would be solely a matter between "the parties to this lawsuit" and that the Union would not have any of the responsibilities it would normally have with respect to an arbitration under the collective bargaining agreement Pet. App. 42a. The Union's permission merely allowed the Plaintiffs and Defendants to utilize the Office of the Contract Arbitrator to resolve their ADEA dispute – if they independently agreed on arbitration as a substitute for litigation as their preferred means of resolving their dispute. In other words, the Union, as one of the partners to the Office of the Contract Arbitrator, was merely agreeing that the Office's panel of arbitrators could be available to arbitrate the dispute between the Plaintiffs and the Defendants in the same manner as employers who are not members of the Realty Advisory Board utilize that Office to arbitrate disputes arising under their agreements.

In sum, the Contractors Agreement does not bind covered employees to arbitrate discrimination claims that Local 32BJ has declined to advance to arbitration through "the grievance and arbitration procedure [in] Article V and VI." Pet. App. 48a. That being so, the courts below correctly denied the Defendants petition to order the Plaintiffs to arbitrate their ADEA claims pursuant that agreement.

CONCLUSION

The decision of the courts below denying the motion to order arbitration should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

ARTICLE V

Grievance Procedure

1. The parties shall provide for a grievance procedure to perform the following functions:

(a) To endeavor to adjust all issues not covered by and not inconsistent with any provision of this Agreement and which the parties are not required to arbitrate under the terms of this Agreement.

(b) To endeavor to adjust without arbitration any issue between the parties which under this Agreement the parties are obligated to submit to the Arbitrator. The cost of administering Step II Grievance Meetings, including the retention of a mediator to facilitate resolution of grievances, shall be borne equally by the RAB and the Union.

2. (a) The grievance may first be taken up directly with a representative of the Employer and a representative of the Union.

(b) If the grievance is not resolved it may be presented for resolution at a Step II Grievance Meeting. Counsel for the Union and the Employer may be present at any grievance procedure meeting.

(c) If a grievance is not resolved through the steps of the grievance procedure it may be submitted to the Arbitrator, who shall be authorized to take jurisdiction upon the request of either party if there shall be unreasonable delay in the processing of the grievance.

(d) Any grievance, except as otherwise provided herein and except a grievance involving basic wage violations, including Pension, Health, Training, Legal and/or SRSF contributions as set forth in Article X, shall be presented to the Employer in writing 120 days of its occurrence, except for grievances involving suspension without pay or discharge, which shall be presented within forty-five (45) days, unless the Employer agrees to an extension, or the Arbitrator finds one should be granted for good cause shown.

APPENDIX B

April 19, 2000

BY HAND

James Berg
President, Realty Advisory Board
292 Madison Avenue
New York, NY 10017

RE: 2000 Apartment Building Agreement

Dear Jim:

During the Apartment Building agreement negotiations, the Union agreed to conform the anti-discrimination language contained in the 1997 Apartment Building agreement to reflect the anti-discrimination language in the 1999 Commercial Building Agreement. Those modifications were not intended to alter or change the parties' understanding set forth in the 1997 Apartment Building agreement. Rather, they reflected the parties' intention to carry forward their original understanding set forth in the 1997 Apartment Building agreement in response to intervening court decisions.

As I expressed to you during the negotiations, I am not entirely comfortable with the principle that a worker will be limited in his or her choice of forum in which to pursue statutory claims of discrimination.

However, notwithstanding these reservations, in the light of the bargaining history set forth above, the Union agreed to continue the parties' prior understanding into the current Apartment agreement

This agreement was based on our joint commitment to diversify the panel of arbitrators to better reflect the Union's membership, to develop procedures appropriate for such cases, and to evaluate our experience in connection with these claims at the conclusion of this agreement and in light of any subsequent court decisions.

Sincerely,

Michael P. Fishman, Trustee
Local 32B-32J, Service Employees
International Union

AGREED
By:____________________________
James Berg, President, Realty Advisory Board